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COMMERCIAL REPORT.

A FULL AND CORRECT

R E P O R T

OF THE

GREAT COMMERCIAL CAUSE

OF

MINET AND FECTOR.

VERSUS

GIBSON AND JOHNSON;

Decided in the House of Lords on MONDAY the 14th of
FEBRUARY, 1791.

INCLUDING

T H E S P E E C H E S

OF THE

LORD CHANCELLOR,	LORD LOUGHBOROUGH.
LORD KENYON,	LORD CHIEF BARON, &c.

D U B L I N:

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M.DCC.XCI.



P R E F A C E

*I*T is universally acknowledged, that this is a Cause of the utmost importance to the Public, and particularly to the Commercial World:—It involves property to the amount of upwards of one million; and consequently, in point of value, is one of the most nomentous causes that ever occurred in a Court of Justice.

The great object of this Publication is, to give a correct statement of the learned and ingenious arguments on both sides. How far we have succeeded in this attempt, is not for us to determine.

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Another consideration was, to bring the whole merits of this Cause within a moderate compass. For this reason we have not given at large the speeches of some of the learned Judges, who were of the same opinion, and who argued nearly on the same principles with those whose speeches are reported at greater length.

Upon the whole, we flatter ourselves, although this Report is chiefly intended for the information of Commercial Men, that it may not be unworthy of a reading from Gentlemen of the Profession.

THE EDITOR.

MINET AND FECTOR,

VERSUS

GIBSON AND JOHNSON.

DECLARATION.

LONDON. To wit, THOMAS GIBSON, late of London, Merchant, and JOSEPH JOHNSON, late of the same place Merchant, were attached to answer HUGHES MINET and JAMES PETER FECTOR, in a Plea of Trespass on the case. And whereupon the said Hughes and James Peter, by Edwin Dawes, their Attorney, complain.

First Count.—FOR THAT WHEREAS, certain Persons using trade and commerce as copartners, in the copartnership name and firm of LIVESKY, HARGREAVE and COMPANY, on the 18th day of February, in the year of our Lord 1788, at Manchester, to wit, at London aforesaid,

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at the parish of St. Mary le Bow, in the ward of Cheap, according to the usage and custom of merchants, made their certain bill of exchange in writing, the hand of one of the said copartners, on their joint account, and in their copartnership name and firm, to wit, Livesey Hargreave and Co. being thereunto subscribed, bearing date the same day and year aforesaid, and directed the same bill of exchange to the said Thomas Gibson and Joseph Johnson, by the names and description of Messrs. Gibson and Johnson, Bankers, London, and thereby required the said Thomas Gibson and Joseph Johnson, three months after date, to pay to Mr. JOHN WHITE, or order, 721l. 5s. value received, with or without advice; they the said Livesey, Hargreave and Company, then and there well knowing that no such person as John White, in the said bill of exchange mentioned, existed. Upon which said bill of exchange, afterwards, to wit, on the same day and year aforesaid, at London aforesaid, at the parish and ward aforesaid, a certain indorsement in writing was made, purporting to be the indorsement of John White, named in the said bill, and to be subscribed with his hand and name, and which said indorsement purported to require the said sum of money, in the said bill of exchange contained, to be paid to the said Livesey, Hargreave and Company, or their order. And the said bill of exchange,

exchange being so indorsed as aforesaid, they the said person using trade and commerce in the name and firm of Livesey, Hardgreave and Company, as aforesaid, afterwards, to wit, on the same day and year aforesaid, at London aforesaid, at the parish and ward aforesaid, by a certain indorsement in writing, made upon the said bill of exchange, and subscribed with the hand and name of one Absalom Goodrich, by procuration of the said Livesey, Hargreave and Co. according to the usage and custom of merchants, appointed the said sum of money, in the said bill of exchange contained, to be paid to the said Hughes and James Peter, and then and there delivered the said bill of exchange, so indorsed as aforesaid, as well with the name of the said John White, as with the name of the said Absalom, to the said Hughes and James Peter; which said bill of exchange, afterwards, to wit, on the same day and year aforesaid, at London aforesaid, in the parish and ward aforesaid, according to the usage and custom of merchants was shewn and presented to the said Thomas Gibson and Joseph Johnson, for their acceptance thereof; and the said Thomas Gibson and Joseph Johnson then and there, according to the usage and custom of merchants, accepted the same, they the said Thomas Gibson and Joseph Johnson then and there well knowing that no such person as John White, in the said bill of

exchange named, existed ; and that the name of John White, so indorsed on the said bill of exchange, was not the hand-writing of any person of that name ; by reason whereof, and by force of the usage and custom of merchants, the said Thomas Gibson and Joseph Johnson became liable to pay to the said Hughes and James Peter, the said sum of money in the said bill of exchange contained, according to the tenor and effect of the said bill of exchange, and their acceptance thereof, as aforesaid. And being so liable, they the said Thomas Gibson and Joseph Johnson, afterwards, to wit, on the same day and year aforesaid, at London aforesaid, at the parish and ward aforesaid, undertook, and to the said Hughes and James Peter, then and there faithfully promised to pay them, the said sum of money in the said bill of exchange contained according to the tenor and effect of the said bill of exchange, and their acceptance thereof as aforesaid

Second Count.—AND WHEREAS ALSO, the said persons using trade and commerce as copartners, in the copartnership name and firm of Livesey, Hargreave and Company, on the said 18th day of February, in the said year of our Lord 1788, at Manchester, to wit, at London aforesaid, in the parish and ward aforesaid, according to the usage and custom of merchants made their certain other bill of exchange in
writing,

writing, the hand of one of the said copartners, on their joint account, and in their said copartnership name and firm, to wit, Livesey, Hargreave and Company, being thereunto subscribed, bearing date the same day and year aforesaid, and then and there directed the said last-mentioned bill of exchange to the said Thomas Gibson and Joseph Johnson, by the names and description of Messrs. Gibson and Johnson, Bankers, London; and thereby required the said Thomas Gibson and Joseph Johnson, three months after date, to pay to Mr. John White, or order, 721l. 5s. value received, with or without advice; they the said Livesey, Hargreave and Company, then and there well knowing that the said last named John White was not a person dealing with, or known to the said Livesey, Hargreave, and Company, and using the name of the said John White, in the same bill, as a nominal person only, and intending not to deliver the same to him, or to procure the same to be actually endorsed; by him: upon which said last-mentioned bill of exchange, afterwards, to wit, on the same day and year aforesaid, at London aforesaid, at the parish and ward aforesaid, a certain indorsement in writing was made, purporting to be the indorsement of John White, named in the same bill, and to be subscribed with his hand and name; and which said last mentioned indorsement purported to require the said sum of

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money, in the same bill of exchange contained, to be paid to the said Liveey, Hargreave and Company, or their order. And the said last mentioned bill of exchange, being so indorsed as aforesaid, they the said persons using trade and commerce in the name and firm of Livesey, Hargreave and Company, as aforesaid, afterwards, to wit, on the same day and year aforesaid, at London aforesaid, at the parish and ward aforesaid, by a certain indorsement made upon the said last mentioned bill of exchange, and subscribed with the hand and name of one Abalom Goodrich, by procuration of the said Livesey, Hargreave and Company, according to the usage and custom of merchants, appointed the said sum of money, in the said last mentioned bill of exchange contained, to be paid to the said Hughes and James Peter, and then and there delivered the said last mentioned bill of exchange, so indorsed as aforesaid, to the said Hughes and James Peter, without having delivered the same bill to the said John White, and without any actual indorsement or assignment of the same bill by the said John White; which said last mentioned bill of exchange, so indorsed as aforesaid, afterwards, to wit, on the same day and year aforesaid, at London aforesaid, in the parish and ward aforesaid, according to the usage and custom of merchants, was shewn and presented to the said Thomas Gibson
and

and Joseph Johnson for their acceptance thereof; and the said Thomas Gibson and Joseph Johnson, then and there well knowing that the said Livesey, Hargreave and Company, had made and delivered the said bill in manner aforesaid, and with such intention as aforesaid, and that the name of John White, indorsed upon the said last mentioned bill of exchange, was not the proper hand-writing of John White, in the same bill mentioned, then and there accepted the same. By reason whereof, and by force of the usage and custom of merchants, the said Thomas Gibson and Joseph Johnson became liable to pay to the said Hughes and James Peter, the said sum of money in the said last mentioned bill of exchange contained, according to the tenor and effect of the said last mentioned bill of exchange, and their acceptance thereof, as aforesaid. And being so liable, they the said Thomas Gibson and Joseph Johnson, afterwards, to wit, on the same day and year aforesaid, at London aforesaid, in the parish and ward aforesaid, undertook, and to the said Hughes and James Peter then and there faithfully promised to pay to them the said sum of money in the said last mentioned bill of exchange contained, according to the tenor and effect of the same bill, and their acceptance thereof, as last aforesaid.

Third Count.—AND WHEREAS ALSO, the said persons using trade and commerce as copart-

ners, in the copartnership name and firm of Live-
sey, Hargreave and company, on the said 18th
day of February, in the said year of our Lord
1788, at Manchester, to wit, at London afore-
said, at the parish and ward afore said, according
to the usage and custom of merchants, made
their certain other bill of exchange in writ-
ting the hand of one of the said copartners,
on their joint account, and in their said copart-
nership name and firm, to wit, Livesey Har-
greave and Company, being thereunto sub-
scribed, bearing date the same day and year
afore said, and then and there directed the said
last mentioned bill of exchange to the said
Thomas Gibson and Joseph Johnson, by the
names and description of Messrs Gibson and
Johnson, Bankers, London; and thereby required
the said Thomas Gibson and Joseph Johnson,
three months after date, to pay to them, the said,
Livesey, Hargreave and Company, by the name
and description of Mr. John White, or order
721l. 5s. value received, with or without advice.
And the said persons so using trade and com-
merce, in the name and firm of Livesey, Har-
greave and Company, as afore said, afterwards,
to wit, on the same day and year afore said, at
London afore said, in the parish and ward afore-
said, by a certain indorsement in writing made
upon the said last mentioned bill of exchange
subscribed with the hand and name of one Ab-
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lom Goodrich, by procuration of the said Live-
 sey, Hargreave and Company, according to the
 usage and custom of merchants, appointed the
 said sum of money, in the said last mentioned
 bill of exchange contained, to be paid to the said
 Hughes and James Pêter, and then and there de-
 livered the said last mentioned bill of exchange,
 so indorsed as aforesaid, and also having the
 name of John White indorsed upon the same, to
 the said Hughes and James Peter ; which said
 last mentioned bill of exchange, afterwards, to
 wit, on the same day and year aforesaid, at Lon-
 don aforesaid, in the parish and ward aforesaid,
 according to the usage and custom of merchants,
 was shewn and presented to the said Thomas
 Gibson and Joseph Johnson, for their acceptance
 thereof ; and the said Thomas Gibson and Joseph
 Johnson, then and there, according to the usage
 and custom of Merchants, accepted the same :
 By reason whereof, and by force of the usage
 and custom of merchants, the said Thomas Gib-
 son and Joseph Johnson became liable to pay to
 the said Hughes and James Peter, the said sum
 of money in the said last-mentioned bill of ex-
 change contained, according to the tenor and
 effect of the said last-mentioned bill of ex-
 change, and their acceptance thereof, as aforesaid,
 And being so liable, they the said Thomas Gib-
 son and Joseph Johnson, afterwards, to wit, on the
 same day and year aforesaid, at London afore-
 said,

faid, at the parish and ward aforefaid, undertook and to the faid Hughes and James Peter then and there faithfully promised to pay to them the faid fum of money in the faid laft mentioned bill of exchange contained, according to the tenor and effect of the fame bill, and their acceptance thereof, as laft aforefaid.

Fourth Count.—AND WHEREAS ALSO, the faid perfons using trade and commerce as copartners, in the copartnership name and firm of Livesey, Hargreave and Company, on the faid 18th day of February, in the faid year of our Lord 1788, at Manchester, to wit, at London, aforefaid, at the parish and ward aforefaid, according to the ufage and custom of merchants, made their certain other bill of exchange in writing, the hand of one of the faid copartners, on their joint account, and in their faid copartnership name and firm, to wit, Livesey, Hargreave and Company, being thereunto fubfcribed, bearing date the fame day and year aforefaid ; and then and there directed the faid laft-mentioned bill of exchange to the faid Thomas Gibson and Joseph Johnson, by the names and description of Mefrs. Gibson and Johnson, Bankers, London ; and thereby requested them, the faid Thomas Gibson and Johnson, three months after date, to pay to Mr. John White, or order, 731l. 5s. value received, with or without advice ; and then and there delivered the faid bill of exchange to the faid

said John White ; and the said John White afterwards, to wit, on the same day and year aforesaid, at London aforesaid, in the parish and ward aforesaid, according to the usage and custom of merchants, indorsed the said bill of exchange ; and, by that indorsement, appointed the said sum of money in the said last mentioned bill of exchange contained, to be paid to the said Hughes and James Peter, and then and there delivered the said last mentioned bill of exchange, so indorsed, to the said Hughes and James Peter ; which said bill of exchange afterwards, to wit, on the same day and year aforesaid, at London aforesaid, in the parish and ward aforesaid, according to the usage and custom of merchants, was shewn and presented to the said Thomas Gibson and Joseph Johnson, for their acceptance thereof ; and the said Thomas Gibson and Joseph Johnson, then and there, according to the usage and custom of merchants, accepted the same : By reason, whereof, and by force of the usage and custom of merchants, the said Thomas Gibson and Joseph Johnson became liable to pay to the said Hughes and James Peter, the said sum of money in the said last mentioned bill of exchange contained, according to the tenor and effect of the said last mentioned bill of exchange, and their acceptance thereof, as last aforesaid.— And being so liable, they, the said Thomas Gibson and Joseph Johnson, afterwards, to wit, on
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the same day and year aforesaid, at London aforesaid, in the parish and ward aforesaid, undertook, and to the said Hughes and James Peter then and there faithfully promised to pay them the said sum of money in the said last mentioned bill of exchange contained, according to the tenor and effect of the said last mentioned bill of exchange, and their acceptance thereof, as aforesaid.

Fifth Count—AND WHEREAS ALSO, the said persons using trade and commerce as copartners, in the copartnership name and firm of Livesey, Hargreave and Company, on the said 18th day of February, in the said year of our Lord 1788, at Manchester, to wit, at London aforesaid, at the parish and ward aforesaid, according to the usage and custom of merchants, made their certain other bill of exchange, in writing, the hand of one of the said copartners, on their joint account, and in their said copartnership name and firm, to wit, Livesey, Hargreave and Company being thereunto subscribed bearing date the same day and year aforesaid, and then and there directed the said last mentioned bill of exchange to the said Thomas Gibson and Joseph Johnson, by the names and description of Messrs. Gibson and Johnson, Bankers, London; and thereby required them, the said Thomas Gibson and Joseph Johnson, three months after date, to pay to the bearer of the said last mentioned bill

bill, 721l. 5s. value received, with or without advice: And the said Hughes and James Peter in fact say that afterwards, and before any payment of the said last mentioned bill of exchange, to wit, on the same day and year aforesaid, at London aforesaid, at the parish and ward aforesaid, they the said Hughes and James Peter became, and were the bearers and owners of the said last mentioned bill of exchange, of which last mentioned premises, the said Thomas and Joseph then and there had notice. And the said Hughes and James Peter, further say, that afterwards, to wit, on the same day and year aforesaid, at London aforesaid, at the parish and ward aforesaid, the said last mentioned bill of exchange was presented and shewn to the said Thomas and Joseph, who thereupon, then and there duly accepted the same, according to the usage and custom of merchants aforesaid: By reason whereof, and according to the usage and custom of merchants, the said Thomas and Joseph became liable to pay to the said Hughes and James Peter the said sum of money in the said last mentioned bill of exchange specified, according to the tenor and effect of the same bill. And being so liable, they the said Thomas and Joseph, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at London aforesaid, at the parish and ward aforesaid, undertook, and to the said Hughes and James

James Peter then and there faithfully promised to pay them the said sum of money in the said last mentioned bill of exchange specified, according to the tenor and effect of the same last mentioned bill of exchange.

Sixth Count.—AND WHEREAS ALSO, the said persons using trade and commerce as copartners, in the copartnership name and firm of Livesey, Hargreave and Company, on the said 18th day of February, in the said year of our Lord 1788, at Manchester, to wit, at London aforesaid, at the parish and ward aforesaid, according to the said usage and custom of merchants, made their certain other bill of exchange, in writing, the hand of one of them, on their joint account, and in their said copartnership name and firm of Livesey, Hargreave and Company, being thereunto subscribed, bearing date the same day and year aforesaid; and then and there directed the said last mentioned bill of exchange to the said Thomas Gibson and Joseph Johnson, by the names and description of Messrs. Gibson and Johnson, Bankers, London; and thereby requested the said Thomas Gibson and Joseph Johnson, three months after date, to pay to Mr. John White, or order, 721l. 5s. value received, with or without advice. And the said Hughes and James Peter aver, that when the said last mentioned bill of exchange was so made as aforesaid, or at any time afterwards, there was not any
such

such person as John White, the supposed payee named in the same bill of exchange : but that the same name was merely fictitious, to wit, at London aforesaid, at the parish and ward aforesaid : By reason whereof, the said sum of money mentioned in the said last mentioned bill of exchange, became, and was payable to the bearer thereof, according to the effect and meaning of the said bill. And the said Hughes and James Peter aver, that they the said Hughes and James Peter, afterwards, to wit, on the same day and year aforesaid, at London aforesaid, in the parish and ward aforesaid, in due form of law became, and were, and still continue, the bearers and proprietors of the said last mentioned bill of exchange. And the said Hughes and James Peter further say, that afterwards, to wit, on the same day and year aforesaid, at London aforesaid, at the parish and ward aforesaid, the said last mentioned bill of exchange was presented and shewn to the said Thomas Gibson and Joseph Johnson, who then and there duly accepted the same, according to the usage and custom of merchants : By reason whereof, and according to the said usage and custom of merchants, they the said Thomas Gibson and Joseph Johnson, then and there became and were liable to pay to the said Hughes and James Peter, the said sum of money in the said last mentioned bill of exchange specified, according to the tenor and effect thereof : And being so liable,

liable, they the said Thomas Gibson and Joseph Johnson, in consideration thereof, afterwards, to wit, on the same day and year aforesaid, at London aforesaid, at the parish and ward aforesaid, undertook, and to the said Hughes and James Peter then and there faithfully promised to pay them the said sum of money in the said last mentioned bill of exchange specified, according to the tenor and effect of the same bill.

Seventh Count.—AND WHEREAS ALSO, before and at the time of the making and indorsing of the bill of exchange herein after mentioned, there was a certain partnership or house of certain persons using trade and commerce, as well in the names and firm of Livesey, Hargreave and Company, as in the name and firm of John White, to wit, at London aforesaid, at the parish and ward aforesaid AND WHEREAS the said last mentioned persons, on the said 18th day of February, in the year of our Lord 1788 aforesaid, at Manchester, to wit, at London aforesaid, at the parish and ward aforesaid, according to the usage and custom of merchants, made their certain other bill of exchange in writing, the hand of one of the said last mentioned copartners, on their joint account, and in their copartnership name and firm of Livesey, Hargreave and Company, being thereunto subscribed, bearing date the same day and year aforesaid; and then and there directed the said last mentioned bill of exchange

change to the said Thomas Gibson and Joseph Johnson, by names and description of Messrs. Gibson and Johnson, Bankers, London; and thereby required the said Thomas Gibson and Joseph Johnson, three months after date, to pay them, the said last mentioned copartners, by the name of Mr. John White, or order, 721l. 5s. value received, with or without advice. And the said last mentioned copartners, afterwards, to wit, on the same day and year afore said, at London afore said, at the parish and ward afore said, by a certain indorsement in writing, by them made upon the said last mentioned bill of exchange, according to the usage and custom of merchants, appointed the said sum of money in the said last mentioned bill of exchange contained, to be paid to the said Hughes and James Peter, and then and there delivered the said last mentioned bill of exchange so indorsed as afore said, to the said Hughes and James Peter: which said last mentioned bill of exchange afterwards, to wit, on the same day and year afore said, at London afore said, at the parish and ward afore said, according to the usage and custom of merchants, was shewn and presented to the said Thomas Gibson and Joseph Johnson, for their acceptance thereof: And the said Thomas Gibson and Joseph Johnson then and there, according to the usage and custom of merchants, accepted the same: By reason whereof, and by

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force of the usage and custom of merchants, the said Thomas Gibson and Joseph Johnson became liable to pay to the said Hughes and James Peter, the said sum of money in the said last mentioned bill of exchange contained, according to the tenor and effect of the said last mentioned bill of exchange, and their acceptance thereof, as aforesaid. And being so liable, they the said Thomas Gibson and Joseph Johnson, afterwards, to wit, on the same day and year aforesaid, at London aforesaid, at the parish and ward aforesaid, undertook, and to the said Hughes and James Peter then and there faithfully promised to pay to them the said sum of money in the said last mentioned bill of exchange contained, according to the tenor and effect of the same bill, and their acceptance thereof, as last aforesaid.

Eighth Count.—AND WHEREAS ALSO, the said Thomas Gibson and Joseph Johnson, afterwards, to wit, on the 1st day of May, in the year of our Lord 1789, at London aforesaid, at the parish and ward aforesaid, were indebted unto the said Hughes and James Peter in the further sum of 1000l. of lawful money of Great Britain, for so much money by the said Thomas Gibson and Joseph Johnson before that time had and received, to and for the use of the said Hughes and James Peter: And being so indebted, they, the said Thomas Gibson and Joseph Johnson, in
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consideration thereof, afterwards, to wit, on the same day and year last aforesaid, at London aforesaid, at the parish and ward aforesaid, undertook, and to the said Hughes and James Peter then and there faithfully promised to pay them the said last mentioned sum of money, whenever they should be thereunto after requested.

Ninth Count.—AND WHEREAS ALSO, the said Thomas Gibson and Joseph Johnson, afterwards, to wit, on the same day and year last aforesaid, at London aforesaid, at the parish and ward aforesaid, were indebted unto the said Hughes and James Peter, in the further sum of 1000*l.* of like lawful money, for so much money by the said Hughes and James Peter before that time paid, laid out and expended, to, and for the use of the said Thomas Gibson and Joseph Johnson, at their like instance and request: And being so indebted, they the said Thomas Gibson and Joseph Johnson, in consideration thereof, afterwards, to wit, the same day and year last aforesaid, at London aforesaid, at the parish and ward aforesaid, undertook, and to the said Hughes and James Peter then and there faithfully promised to pay them the said last mentioned sum of money, whenever they should be thereunto afterwards requested.

Tenth Count.—AND WHEREAS ALSO, the said Thomas Gibson and Joseph Johnson; after-

wards, to wit, on the same day and year last
aforesaid, at London aforesaid, at the parish and
ward aforesaid, were indebted unto the said
Hughes and James Peter in the further sum of
1000*l.* of like lawful money, for so much money
by the said Hughes and James Peter before that
time lent and advanced to the said Thomas Gib-
son and Joseph Johnson, at their like instance
and request: And being so indebted, they the
said Thomas Gibson and Joseph Johnson, in con-
sideration thereof, afterwards, to wit, on the
same day and year last aforesaid, at London
aforesaid, at the parish and ward aforesaid, un-
dertook, and to the said Hughes and James Peter
then and there faithfully promised to pay to
them the said last mentioned sum of money,
whenever they should be thereunto afterwards
requested.

Breach.—NEVERTHELESS, they, the said
Thomas Gibson and Joseph Johnson, not regard-
ing their said several promises and undertakings,
so made as aforesaid; but contriving, and frau-
dulently intending craftily and subtilly to de-
ceive and defraud the said Hughes and James
Peter, in this behalf, have not, nor hath either
of them, although often requested, paid to them,
or either of them, the said several sums of money,
or any of them, or any part thereof; but to pay
the same to them, or either of them, have hi-
therto altogether refused, and still do refuse, to
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the damage of the said Hughes and James Peter of 1000l. And therefore they bring their suit, &c.

PLEA.—And the said Thomas and Joseph, by Joseph Kaye, their attorney, come and defend the wrong and injury, when, &c. and say, that they did not undertake and promise in manner and form as the said Hughes Minet and James Peter Fector have above thereof complained against them; and of this they put themselves upon the country, &c. And the said Hughes Minet and James Peter Fector do the like:—Therefore, the Sheriff's are commanded, that they cause to come before our Lord the King, in three weeks of the Holy Trinity, wheresoever he shall then be in England; twelve, &c. by whom, &c. to recognize, &c. and who neither, &c. because, as well, &c. the same day is given to the parties aforesaid, there, &c.

NOVEMBER 3, 1789

SITTINGS AT GUILDHALL,
L O N D O N

BEFORE

THE RIGHT HON. LLOYD LORD KENYON,

And a SPECIAL JURY of MERCHANTS.

MINET	}	AGAINST	}	GIBSON
AND				AND
FECTOR,				JOHNSON,

AS millions depended on the event of this cause, it was, perhaps, in point of value, the most important that ever occurred in this commercial country.

LIVESEY and Co. drew a Bill of Exchange on GIBSON and JOHNSON, for 721l. 5s. dated February 18th, 1788, and payable, at three months to *John White, or order.*

This bill was accepted by the defendants, and discounted by the plaintiffs; who, of course, in
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the character of indorsees, for a full and valuable consideration, brought this action against the acceptors.

Mr. *Bearcroft* opened this case on the part of the plaintiffs. Said he, John White, to whom this bill is made payable, and who is the first indorser, is a mere non-entity;—he has no existence.—I shall be able to prove, by legal evidence, to the entire satisfaction of you, the Jury, that it was the constant custom of the house of Livezey and Co. to draw bills on Gibson and Johnson, payable to fictitious persons: and that Gibson and Johnson accepted those bills, with the knowledge and privity of this fact.—Those bills were drawn in favour of fictitious payees, merely for convenience and for the purpose of raising money for the house of Livezey and Co.—There is no necessity for me to state to Gentlemen of your description, whom I have now the honour of addressing, the convenience of shifting and changing names.—This, at least, had the appearance of more credit, and gave those bills a greater currency.—In point of fact, I shall be able to bring it home to the defendants, that they were in the habit of accepting bills of exchange, drawn by Livezey and Co. and made payable to fictitious payees; and that the defendants actually knew those payees to be fictitious in a great variety of instances.—I may not

perhaps, be able to prove, that the particular bill on which this action is brought, was payable to a fictitious person, with the privity and knowledge of the defendants; but though I am not certain that I shall be able to fix them with this knowledge, in this particular instance, yet if I can shew it to have been the constant practice of Livezey and Co. to draw bills, and for the defendants to accept them, under such circumstances, it will amount precisely to the same thing as if I proved it to have been the case in this bill:—for, if drawing and accepting such bills was agreeable to the general tenour of their dealings and transactions with each other, it may be attributed to them in its fullest extent; and consequently will amount exactly to the same thing as if I could prove their knowledge of this particular bill's being drawn in favour of John White, who has no existence.

A general course of practice is an authority to go on, as if a particular authority had been given in this instance.—It appears to me, that the case of *Tatlock against Harris* will have some influence on the case now before us. There is certainly a family likeness between the two cases, and this I shall be able to prove.—I am ready to confess that I labour under some difficulty to prove certain parts of this case.—The witnesses who could have proved it best, are, certainly for the best possible reason, a little shy of appearing
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in a Court of Justice.—Three or four witnesses, who could have spoken to the most material facts, and thrown much light on this cause, are not here.

I understand some of the first houses in London draw bills payable to fictitious persons ;—and I must say, that it very ill becomes lawyers to find fault with fictitious names.—The names of John Doe and Richard Roe, are now, whatever they were originally, as fictitious as the name of John White on this bill.

I am instructed to say, that I shall be able to affect the defendants by many witnesses.—If I establish this fact, namely, that Gibson and Johnson accepted this bill, with the full knowledge that it was drawn in favour of a fictitious payee, the plaintiffs, beyond all controversy, will be entitled to recover.

When a man accepts a bill of exchange, what does he do ?—He undertakes to pay the value of that bill to any person who has a right to receive it. In this case, the defendants may, perhaps, say to the plaintiffs, prove your title under John White, as first payee. But if I shew that John White does not exist, this is impossible. And if White is nobody, the defendants can run no risk in paying the amount of this bill to the plaintiffs, who are honest, *bona fide* holders of it.—When Livesey and Co drew this bill on Gibson and Johnson, they chose to make it payable to
John

John White, that is to a person who has no existence. The consequence was, that this bill was still in the power of Livesey and Co. In its effect, it must be considered as a bill payable to bearer. It is payable to those who have chosen to act in the name of John White. It is payable to my clients, who have purchased it for a fair and full consideration.—They, and they only, are entitled to recover.

I shall call my witnesses, and prove that the defendants were in the habit of accepting drafts, payable to fictitious persons; and that they were fully apprised of this circumstance.

EVIDENCE FOR THE PLAINTIFFS.

Robert Booth.—I was one of the clerks of Livesey and Co. This (*looking at the body of the bill in question*) is the hand-writing of Mr. Smith, who is one of the partners in the house of Livesey and Co.

The acceptance on this bill is the hand-writing of Mr. Johnson.

I do not know any person of the name of John White, in whose favour this bill is drawn. The indorsement of John White on the back of it, is the hand-writing of one of the clerks of Livesey and Co. I know it was the practice of the house of Livesey and Co. to draw bills on Gibson and Johnson, payable to fictitious persons, and of
Gibson

Gibson and Johnson to accept those bills. They were in the habit of doing business in this way.

Mr. Erskine.—Does your lordship think this evidence admissible ?

Lord Kenyon.—I am of opinion that it is admissible. Any thing turning on the particular frame of the bill, is evidence ; though nothing can speak to the contents of the bill but the bill itself.

Mr. Erskine.—I submit this objection—whether the plaintiffs, who considering themselves as the indorsee of a man who has no existence,—of a fictitious person,—whether Minet and Co. who bring this action to charge Gibson and Johnson with the payment of this specific bill, can, in point of law, gather strength from the general transaction between the drawers and acceptors of this bill ?

Lord Kenyon.— I apprehend this will be more properly urged in your address to the Jury.

Robert Booth.—I have very often carried bills from the drawers, Livesey and Co. to Gibson and Johnson, for acceptance. In general, they were payable to fictitious persons. I cannot say whether Gibson and Johnson knew this circumstance. I have carried five or six different bills at once drawn in favour of fictitious payees, to the house of Gibson and Johnson, for acceptance. Those bills I have carried for acceptance the instant they were drawn, and while the ink was quite wet.

wet. They were unindorsed, and dated Manchester. Livesey and Co. had one house at Manchester, and another in London. I cannot recollect any instance where those bills were indorsed. Gibson and Johnson accepted them directly.—They knew me perfectly.—They knew that I was one of the clerks of Livesey and Co. When I went to the house of Gibson and Johnson, for the purpose of getting bills accepted, I very often saw Mr. Johnson, and he frequently gave them to a clerk to enter.

CROSS-EXAMINED.

Livesey and Co. had no dealings with any person of the name of John White. I know the bill in question was not drawn for any such person. I cannot pretend to say that Livesey and Co. employed no tradesman of the name of White. Those fictitious names were very often changed, in order to give the bills more currency. Any person in the world who looked at those bills must have seen they were very recently drawn. Sometimes they might be antedated a day or two. I am only speaking of those bills which I usually carried.

RE-EXAMINED.

After I had carried one parcel of bills to the house of the defendants for acceptance, I have

have, sometimes, immediately after, taken another parcel.

John Collier,—I was a Clerk in the house of Livefey and Co. in town, from 1787, till they stopped payment. When I first entered into their service, it was my business to enter bills, and afterwards to keep what is called a *bill payable book*. I very often went to the house of Gibson and Johnson for acceptances. Their dealings were very extensive. The transactions of Livefey and Co. with Gibson and Johnson, to speak within compass, amounted annually to upwards of one million. I have taken bills, dated at Manchester, for acceptance, sometimes indorsed, and at other times not. Those bills were payable sometimes to one fictitious person, and sometimes to another. At other times they were payable to real existing persons, though generally to fictitious names. I have carried bills as often unindorsed as indorsed, for the purpose of being accepted, when cash was immediately wanted by Livefey and Co. I have carried bills dated at Manchester, two, three, or four times in the course of one day. I do not believe the house of Livefey and Co. had any transactions with any person of the name of John White.—There was a bill of the value of 700 l. lost, which Gibson and Johnson charged to the account of Livefey and Co. as having accepted it for them.

Livefey

Livesey and Co. said they had never drawn such a bill, and that consequently Gibson and Johnson could not have accepted it. Gibson and Johnson made no enquiry after the person in whose favour that bill was drawn, but ordered me to desire the acceptors not to honour it when it became payable.

CROSS-EXAMINED.

No enquiry was made after this bill for £.700, because there was no such transaction stated in the books. John Hawkins, one of the clerks of Gibson and Johnson, said this bill was accepted by their house. I never distinguished between the bills that were fictitious, and those that were real.—They were all carried in the same way to Gibson and Johnson for acceptance. The bills that were made payable to real payees, might be carried to the house of Gibson and Johnson in the same manner as bills payable to fictitious persons: But I cannot charge my memory. *I believe it was so.* John Hawkins has sometimes come to the house of Livesey and Co. for bills, and after having seen them filled up and indorsed in the counting-house of Livesey and Co. has immediately taken them away to Gibson and Johnson for acceptance.

Had these been real transactions, those bills would have been presented by the payees, and not by the drawers, for acceptance.

Stephen

Stephen Barber.—I am a broker, and got the bill in question discounted for Livesey and Co. by applying to the plaintiffs, Minet and Fector.

CROSS-EXAMINED.

I was employed by Livesey and Co. to get this bill discounted, and for that purpose went to the plaintiffs. Minet and Fector knew that I came from Livesey and Co. When I first carried this bill to the plaintiffs to get it discounted, the name of John White only was indorsed upon the back of it. No question was asked how a bill thus indorsed by the payee, came out of the hands of the drawers. I saw Mr. Fector, one of the partners, and Mr. Goodrich, the chief clerk. They knew perfectly well that I came from the house in Cheapside.—They never asked me how this bill, which, from the indorsement, purported to have been paid away by the drawers, had again came back to their hands.—I myself never suspected it.

Lord Keynon.—What names were upon the back of this bill when the plaintiffs discounted it?

Barber.—When I first carried it to the shop of Minet and Co. they desired me to leave it, which I did, and returned in about an hour.—The plaintiffs then told me, that if Livesey and Co. would indorse this bill, they, Minet and Co. would discount it. Upon this, I immediately went back to Livesey and Co. who indorsed it.

I then

I then returned to the house of the plaintiffs, and received the money.

Mr. Erskine, on the part of the defendants, spoke to this effect.—It is easy to observe, from the very unusual audience now present, that this is a cause of great magnitude, importance, and expectation. And, indeed, without being reminded by this multitude, it is impossible to live in the mighty commercial world, without seeing that this is a question of very great importance. It is a question on which I shall address myself to you with great diffidence. When I compare my little experience with your great experience, that diffidence is increased. I know I rise upon the unpopular side of the question, in the face of a multitude of enlightened persons. This adds to my diffidence still.

At first view, I conceive this to be the case:—Shall a man who accepts a bill of exchange, with the actual privity of a particular fraud practised on the world, afterwards take the advantage of his own wrong, and in an action brought not by the person practising this fraud, but by an innocent individual, refuse to pay that bill for which he has had value?—The human mind starts at the first statement of such a proposition. But let us consider who the parties are.

This is not so clear a case, but that it has raised considerable doubts in the mind of a most able magistrate,—

magistrate, the Lord Chancellor. Having this case brought before him, he would not support those claims which to others appeared so plain, till he had the opinion of a Jury. God forbid that clear opinions, however supported, should prevail in this country unfortified by the positive rules of law. I am not counsel here alone for Gibson and Johnson. It is the misfortune of this case, that the defendants have not only involved themselves, but various other parties.— They, as bankers, had in their hands the money of multitudes of individuals. A bankruptcy follows, and those bills pour in in abundance, to sweep away that fund that was to be divided among the innocent creditors of Gibson and Johnson, among whom are many women and infants. Those who bring this action say, they have a right to be paid out of this fund. This is the case of creditors against creditors. I mean to throw no aspersions on the character of the plaintiffs: I believe it to be perfectly fair and irreproachable. They are holders of a bill for 721l. 5s. and for which they have paid a fair and valuable consideration. And they now contend that this bill ought to be paid out of the estate of Gibson and Johnson, which is now taken out of their hands for the purpose of being divided equally among all their creditors. Shall therefore the holders of this bill be admitted
D equally

equally with the other creditors? Who shall decide between them?—The law shall decide.

If you consider the thing in this point of view, much prejudice, if I may be allowed that expression, will be removed. And when the mind comes truly to consider what every Jury ought to do, I apprehend the holders of this bill cannot recover.

The custom of merchants is not what all the merchants of this great city may think to be the custom, but that which the law has, from time to time, ratified and approved, so as to make it a part of the law by which our properties are protected. If the practice of merchants constituted the law or custom of merchants, then judges must refer to juries, instead of juries referring to them. But the custom of merchants is part of the common jurisprudence of the country. We are in a case wide indeed of the custom of English merchants. We are now in a custom which has begun in fraud, and ended in ruin. This can never be called the custom of merchants. I take the custom of merchants to have had its rise in convenience.—There are three ways of drawing bills, which convenience would suggest, and custom justify. First,—For instance, if *A.* lives in England, and owes *B.* who lives in Holland, £.50, if *C.* be going from Holland to England, he may pay *B.* this £.50, and take a bill of exchange drawn by *B.* in Holland upon *A.* in

A in England, and receive the money when he comes thither. Thus *B* receives his debt at any distance of place, by transferring it to *C*, who carries over his money to England, in paper credit, without danger of robbers or loss. This is a convenience to all the parties. After this *A*'s obligation is not to pay to *B*, but to *C*, to whom this 50 l. is payable on the face of the bill.

Secondly,—Suppose I wish to draw money out of the hands of a third person: I make a bill payable to myself, or order; whoever procures this bill, with my indorsement, is entitled to receive the amount of it.

A third kind of bill, is that payable to bearer.

It is on the convenience of trade that the law or custom of merchants has been built. But a new and infamous custom has begun to prevail, which, it seems, is now to be considered as the custom of England:—That a man shall take a bill with the name of a person on it who has no existence; and that this is to be regarded as a matter of no moment. This would be dangerous indeed. The witnesses have told you, these fictitious names were used for the express purpose of imposing on the public; and that what was written in a real hand, and appeared to be a real transaction, was absolutely false. If the indorsees could recover under such circumstances, it seems to me, that the verdict of a Jury would sanction a dreadful inconsistency;

namely, that a man in a civil action might take, a title for which, in a criminal prosecution, the man who gave him that title, must suffer the punishment of the law.

I refer to you, whether the defendants, at the time they accepted this bill, knew that John White was a fictitious person; or if they did not know it, whether they might have known it.—If it was by a culpable negligence only that they did not know it, I think they are equally bound. But this observation applies equally to the plaintiffs.—You must examine whether they took this bill in the ordinary course of trade.—I do not charge them with any thing that affects their moral character; but if I find them guilty of culpable negligence,—if I find that by a little attention they might have seen this bill was suspicious, the inference must spread like the radii of a circle.—By what evidence are the defendants to be fixed with this privity?—Because the bill was dated at Manchester?—It is no unusual thing for a man to date a bill at London, though he happens to be at a distance from it.—It was observed that the date of this bill, had there been no other circumstance, must have shewn the payee was fictitious.—The arguments of my learned friend are extremely ingenious, but they apply equally to his own clients.—Suppose the plaintiffs could fix the defendants with an hundred felonies, yet if in this particular case they cannot shew the defendants were privy to John White's

White's being a fictitious payee, they cannot recover.

When this bill came to Gibson and Johnson, from Livesey and Co. drawn by them in favour of John White, the defendants might very naturally suspect this name was fictitious.—There is undoubtedly something in this argument ;—but as I have just observed, it applies equally to Minet and Fector.

When this bill was first presented to the plaintiffs, for the purpose of being discounted, they saw the name of a payee ; and if this payee was real, the bill ought to have come to them from the payee, and not out of the hands of the drawers.

The rules of evidence are uniformly the same in all cases, civil and criminal : and the same facts which will enable you to infer that the defendants knew this bill was made payable to a fictitious person, will enable you to come to this positive conclusion,—that a capital felony was committed.—The circumstances under which the plaintiffs received this bill, were out of the usual course of trade ; and the same justice, candour, and liberality of the Jury, which are due to the plaintiffs, extend, in an equal degree, to the defendants.—I can never recover through a forgery, when I either knew of that forgery, or might have known it.

With respect to the witnesses who could have proved this privity in the acceptors, my learned friend hinted at the reason why they had withheld their testimony.—Had they come forward, there was some risk of being hanged.

It is easy to distinguish this case from another, somewhat of a similar nature; viz. *Tatlock against Harris*.—In the last case, the defendant, Harris, drew the bill on himself, and was the fabricator of it from beginning to end;—in the present case, the defendants are only acceptors; and therefore the evidence against them is much weaker.

There is another difference—

In the case of Tatlock and Harris, the defendant drew the bill payable to Greys and Co. in one form, and accepted it in another: *he had likewise hard money for it.*

A man who accepts a bill, undertakes to pay it to any man who has a right to receive it: he undertakes to pay it to any *bona fide* holder.—Now I will undertake to shew that Gibson and Johnson do not stand so circumstanced, in this respect, because they have received no valuable consideration whatever for accepting the bill in question. It was an imposition practised on the defendants, in giving them bad paper, which they had every reason to suppose was good, and part of which really was good. The defendants are in advance to Livesey and Co. £20,000.

Gentlemen,

Gentlemen,—This is a subject entirely for your consideration ; and all that I desire is, that you will do equal justice between the parties.

EVIDENCE FOR THE DEFENDANTS.

Samuel Tudman.—I was a clerk to Gibson and Johnson, and knew their affairs from the time their connection began with Livesey and Co.—They were in advance to Livesey and Co. to a considerable amount.—Bills were drawn to a great extent by both Houses. I never knew that any of those bills were made payable to fictitious payees till after they came to stop payment.—I have no reason to believe, or to suppose, that Gibson and Johnson knew or even suspected, that any of the names on the bills were fictitious.—The bills that were brought for acceptance were sometimes left, but most frequently were accepted when presented.

CROSS-EXAMINED.

I was a clerk before I went to the defendants.—I never said to any body that I knew the names of the indorsers of those bills.—I do not recollect the circumstance of bills coming wet for acceptance;—although they had been wet when drawn, they must have been dry before they got half way to the acceptors.

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Joseph

Joseph Poole.—I was a clerk to Gibson and Johnson previous to the year 1785.—I believe that Gibson and Johnson did not know that the bills drawn by Livesey and Company were in favour of fictitious payees.

CROSS-EXAMINED.

I have seen bills drawn by Livesey and Co. but never saw any man put the name of John White on any them.

John Slack.—I know that two men of the name of White live at Manchester ; the one a grocer, and the other a liquor-merchant.—I do not know that they had any transactions with Livesey & Co.

John Hawkins.—I was a clerk to Gibson and Johnson, and am now clerk to their assignees.—I never saw any clerk in the house of Livesey and Co. put the name of John White on any bill.

CROSS-EXAMINED.

I was clerk to the defendants about twenty-two months.—I kept a cash-book, but never brought bills from Livesey and Co. to Gibson and Johnson for acceptance.—I never saw any bill filled up.—I have made observations on the indorsements, and thought I knew the hand-writing of some of them ; but the person whose hand I thought it was, on being questioned, denied it, or gave evasive answers.—I entered the bills in an acceptance-book.—I never communicated my suspicions respecting the indorsement
to

to Gibson and Johnson.—These bills came regularly for payment, and were duly honoured.

Lord Kenyon.—Evasive answers seem to me to go pretty far to create suspicion.

How came you to pay bills to the amount of hundreds of thousand pounds, to persons who you were not certain had a right to receive them?

To this question the witness gave no answer.

MR. BEARCROFT'S REPLY TO MR. ERSKINE.

I most sincerely join my learned friend in his last petition, that you will do equal justice between the parties in this cause, which I see is of considerable expectation.—In order that I may do justice to my clients, it will be necessary for me to beg of you the same attention which you paid to my learned friend. I may set out with observing, that in point of duty, you are bound to afford it.

My learned friend has on this, as on all other occasions, exerted himself with equal zeal and abilities ;—but, notwithstanding both, which he possesses in very great perfection, he has not one inch of solid ground to support him. I can trace and detect him in every attempt he has made to run away with you in this cause.

It is your duty to leave out of the case the Lord Chancellor's doubts,—an authority for which I have the most unfeigned respect. Every
man

man who knows him, knows the strength of his mind, and his zeal to do justice.

But this case is to be settled by you, on your oaths, without any regard to the doubts of a great judge thrown out in another place, and who has sent this cause into a court of law to be tried by you. You will therefore pay no attention to those doubts, which decide nothing either the one way or the other. My Lord will direct you in deciding the law.

Let us see what the facts of this case really are.—Another attempt was made to mislead you. You were told not to mind the defendants, but were desired to recollect that other persons were likewise concerned in this question. Then my learned friend ranks among the innocent creditors of Gibson and Johnson, *many women and infants*; exhibiting, upon this occasion, those tragic powers which he at times exhibits, a little too much for the gown he wears, in the character of a very able actor.

Let us consider a little what are his arguments. A bill of exchange, said he, had its origin in the convenience of commerce.—He likewise told you that there were three sorts of bills; one payable to a particular payee, a second to the drawer's order, and a third payable to the bearer.—You were also very truly told, that there was a material distinction between a former case and the present. In the case of *Tatlock against Harris,*

Harris, it was taken as a fact in the cause, that the defendants actually had the money in their pockets.—On the present occasion I have no difficulty to say, at the time this bill was accepted by Gibson and Johnson, they were in advance to Livesey and Co.—But what has this argument to do with innocent indorsee, and the purchasers of a bill for a valuable consideration?—This is no answer to men of this description.—The question then will be, whether the present plaintiffs are such innocent indorsee.

In the first place you are to consider, and upon the evidence to decide in point of fact, whether you think Gibson and Johnson, in this transaction, are to be considered as knowing John White was a fictitious payee. I shall not waste your time, nor insult your understandings, in supposing it is a question, whether or not John White is a fictitious person.—The name of John White was not written by John White, but by a clerk in the house of Livesey and Co.—I take my ground here, that you, the Jury, must take it as a point of fact, that John White is a fictitious person, as to the bill in question; and that Gibson and Johnson knew this fact. This will entitle me to a verdict.—I say upon this evidence, there is no one ground for you, the Jury, to decide in favour of the defendants; but you are called on as men of sense, of candour,

dour, and justice, and as merchants, to find a verdict for the plaintiffs.

Whatever knowledge in the transaction of business the agent of a party who carries on that business may possess, shall be taken to be the knowledge of his principal.—There is a similar instance which occurs to every body. Suppose a man at the end of the world employs a broker to effect an insurance, any thing he knows, if it is material, will affect his principal.—Whatever this agent knows or does, shall be considered as the knowledge and deed of the person who employs him. The principal puts the agent in his place:—he is himself. The question then is,—shall the knowledge of the clerks of Gibson and Johnson be imputed to Gibson and Johnson themselves? What man among you cannot decide whether Collier or Hawkins spoke truth? The probability of the thing speaks for itself. Is there a man among you twelve who doubts, and is not perfectly persuaded in his own mind, that Gibson and Johnson knew perfectly well that John White was a fictitious person, and that that they did not care a farthing about it? Tudman, in his evidence, confessed, that Mr. Johnson who had accepted those bills, had the same opportunity as he of observing them; and, altho' they accepted bills annually, at least to the amount of one million, you are desired to believe

live that Tudman had no idea there was any thing fictitious in all this business, and that he had not the least reason to believe or suspect that Gibson or Johnson had any knowledge of it. The conscience and justice of this case entitle the plaintiffs to say to the defendants, you have got that money in your pockets which ought to be in our's.

I say I have a right to recover on a bill of exchange, as a bill of exchange.—In this case, I have no evidence to shew that Gibson and Johnson received any valuable consideration for this bill though they accepted it. If you are to say, that the present plaintiffs, who hold this bill for a valuable consideration, shall not recover, because the bill was made payable to a non-entity, then every person of this great city might get fortunes by drawing bills, putting the names of fictitious persons upon them, and then getting them accepted by their friends, who could never suffer, in as much as the holders could never recover.

I take the law to be this:—An instrument of any kind, of a solemn and important nature, is to be construed, not according to what it says, but according to its meaning,—according to its substance; and therefore points of law relating to the construction of bills of exchange, of policies of insurance, and in short, of every written contract, are to be referred to judges.

In

In this case, Livesey and Co. draw a bill on Gibson for their own use. In doing this, are they not substantially drawing in favour of themselves?—They actually received the money which came out of the pockets of my clients.

Gentlemen,—I ask your pardon for having taken up so much of your time in a case that seems to be so plain. I shall say no more, but sit down in the fullest confidence that you will find a verdict for Minet and Fector.

LORD KENYON'S ADDRESS to the JURY.

GENTLEMEN OF THE JURY :

I shall not trouble you at present with many observations, as the cause has been discussed at great length, by the counsel on both sides ; nothing that I can say, will contribute much to your assistance.—The question now to be decided, is reduced to a single question of fact, and that question is of great importance to the parties immediately concerned, the amount of the bill being near 800l. ; but this case is of infinitely more importance to the commercial world. All questions respecting commerce are of infinite importance to a commercial country.

We find the parties in this cause trading to the amount of one million a year. This is also of great importance.

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The question already decided, viz. *Tatlock against Harris*, and which, as is admitted, bears some relation to the present question, yet is not precisely in point, and does not decide this cause. It was thought proper to have the law discussed, and to have the decision of the Court of Kings Bench on that question. That decision, however, does not exactly apply to this point. Nor is this cause decided by any thing that fell from my Lord in Chancery.—Undoubtedly the Lord Chancellor performed his duty to the public, in sending this question to be discussed before a Special Jury. This question coming before his Lordship, sitting under the Bankrupt Laws, could not be so properly discussed; and it is of importance that all great questions should go to the *dernier resort*,—the House of Lords.

It is admitted, that in bills of exchange, which are drawn in favour of existing persons, it is absolutely necessary that those persons in whose favour such bills are drawn, should, indorse them. This gives title to the bearers, and nothing should change this legal position.

It is also of infinite importance that the law should be known; and that the justice that is administered to private individuals, by trampling on the ground of law, is purchased at a price infinitely too high.

This

The question, as considered by the counsel for the plaintiffs, leaves this ground of law untouched.

What the question in this cause is, must be collected from the record ; and you are now to decide between the parties.

One of the counts, as it is called, or one of the states of the case, is this : That a bill was drawn, payable to John White, or order, for 721l 5s.—that no such person existed ;—that an indorsement was made on this bill, purporting to be the indorsement of John White ;—that this bill was afterwards accepted by the defendants in this cause ;—and that, although they had so accepted this bill, they knew perfectly that no such person as John White existed.

These are the several facts which the plaintiffs say, constitute such a case as entitles them, in point of justice, to appeal to the laws of their country for redress.

That the bill was drawn in favour of John White, is admitted ; and tho', *in rerum natura*, such a man might exist, yet no such man existed for the purpose of this bill. That the bill has been paid, is proved. All is proved in favour of the plaintiffs, except one fact, namely, that the defendants knew that John White had no existence. This is the single question to which this cause, important to the parties, but more important to the commercial world at large, is
now

now. Whether this was so or not, is to be made out, not by direct evidence, but from those facts which have been laid before you by the witnesses on both sides.

In order to prove that the house of Gibson and Johnson accepted and paid all bills that came to them, drawn by Livesey and Co. without considering whether the payee really existed, I shall only state the material parts bearing on this point, without going over all the evidence.

Robert Booth, clerk to Livesey and Co. said, that he had taken many bills for acceptance to Gibson and Johnson the instant they were drawn, and while the ink was moist; that these bills were unindorsed, and in a multitude of instances paid. Gibson and Johnson knew perfectly that he was one of the clerks of Livesey and Co.

The next witness, John Collier, said, that if the transactions had been regular, the payees would have been the persons to have carried those bills to the house of Gibson and Johnson for acceptance.

The clerks of Gibson and Johnson sometimes carried away bills from the house of Livesey and Co. for acceptance.

That the clerks of Livesey and Co. had filled up bills and indorsed them, in the presence of John Hawkins, clerk to Gibson and Johnson; and that Hawkins, immediately after, carried

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them

them to the house of the defendants for acceptance.

Supposing this to be so, it was certainly pretty notorious to the house of Gibson and Johnson, that those bills were not made payable to real, but to fictitious persons.

The evidence of these parties, and the weight and consequence that is due it, is peculiarly within your jurisdiction.

In opposition to this, on the part of the defendants, they call Samuel Tudman, formerly one of the clerks of Gibson and Johnson, and now clerk to their assignees. He said, that no bill, to his knowledge, was drawn in favour of a non-existing person. The same thing was also proved by Joseph Poole, who stated, that he had been frequently at the house of Livesey and Co. and had never seen any of their clerks either fill up bills or indorse them ;—That he had no suspicion that any of those bills were payable to fictitious persons, nor had the smallest reason to believe that Gibson and Johnson had any such knowledge.

John Hawkins said, he thought he sometimes knew the hand-writing of the indorsers ; but when he asked those persons whether such indorsements were their hand-writing, they always denied it, or gave him evasive answers.

He suffered those bills to be paid, and did not communicate his suspicions to his principals.

I would

I would not say any thing harsh of a young man, but surely his conduct was a little inadvertent in this business.

This is all the evidence ; and it is for you to say, whether that which the declaration states to be the case, was the case ; namely, whether this bill was accepted under a colourable pretence, and merely for the purpose of giving it the semblance of a real transaction.

I admit the law to be as laid down by the counsel for the plaintiffs ; when you look at paper, you ought to consider the parties to the transaction. It is not the words of a deed, but the substantial effect of it in the eye of the mind, that ought to govern the transaction.

It is for you to decide on this point : The constitution of the country has given you a jurisdiction over it, and I am certain you will do substantial justice between the parties.

The Jury retired for about five minutes, and found a verdict for the Plaintiffs. Damages 72l. 5s.

MICHAELMAS TERM.

COURT OF KING'S BENCH,

November 6, 1789.

MINET	} Against {	GIBSON
AND		AND
FECTOR,		JOHNSON.

MR. ERSKINE.—In the cause of Minet and Fector, against Gibson and Johnson, tried before your lordship and a Special Jury, last Tuesday, at Guildhall, I, on the part of the defendants, have humbly to move your Lordship in arrest of Judgment.—I make this motion under the idea that my learned friend meant to take a general verdict.—I now find the plaintiffs mean to enter up their verdict on some particular count or counts of the declaration.

Lord Kenyon. I have no objection that it should come on either by a motion in arrest of judgment,

ment, or for a new trial, that the Court may consider the whole justice of the case.

Mr. Justice Buller.—The counsel for the plaintiffs should settle on what counts they will enter up their verdict.

Mr. Erskine.—My best way will be to move for a new trial.

Mr. Bearcroft.—We shall enter up our judgment on the 5th and 7th count.

Mr. Erskine.—I shall then move in arrest of judgment.

Mr. Bearcroft.—I like what my Lord said on this subject,—that the whole justice of the case should come before the Court.

Mr. Erskine.—This will make a great difference to my clients.

Lord Kenyon.—The only thing, I understood, that Mr. Erskine was anxious to guard against was, that the verdict should not be entered up on the count for money had and received. There was no evidence of this.—I stated to the Jury what I looked upon to be the merits of the question.

Mr. Justice Buller.—If you, Mr. Erskine, think that the evidence given at the trial of this cause

does not warrant a verdict on the 5th and 7th count, you will move for a new trial ; on the contrary, if you are of opinion that the evidence does warrant the verdict on these two counts, you will move in arrest of judgment.

Mr. Erskine.—I shall first move for a new trial, and shall not be precluded from moving afterwards, if necessary, in arrest of judgment.—I shall certainly contend that the evidence does not warrant the verdict on the 5th and 7th count

Lord Kenyon.—Let two rules be drawn up, and let them come on together,

MICHAEL.

MICHAELMAS TERM.

COURT OF KING'S BENCH,

Monday November 16, 1789.

MINET	} Against }	GIBSON
AND		AND
FECTOR,		JOHNSON.

MR. ERSKINE, on the part of the defendants, said he was anxious as to the arrangement of this case. The plaintiffs had been called upon to say, on what count or counts they would take their verdict :—They had answered, on the 5th and 7th count.

He said, he was now called upon to shew why the verdict should not be taken on those counts.

He observed, that he had no other wish, in presenting himself first to the Court, than that the subject might be intelligible, and that his objections might be answered.

His first proposition was, that the evidence given at the trial did not support any count in the declaration but the first ; and therefore the plaintiffs must take their verdict on that count.

Secondly, he meant to contend, that if the verdict was taken on the first count, the judgment must be arrested, as bad, on the record.—They were to consider whether the evidence would support any of the other counts.—The evidence, or rather the facts, which the Jury found as the result of the evidence, were clear and unequivocal.—The facts which the Jury must have necessarily found were, that Livesey, Hargreave and Co drew a bill, payable to John White, or order, knowing that no such person existed ;—that the drawers, Livesey Hargreave and Co. indorsed it to the plaintiffs ;—and that the defendants, Gibson and Johnson, accepted it, knowing also that no such person as John White existed ;—and that, on the settling of accounts between the parties, the balance was in favour of the defendants, who had received no value for the bill.—These were the facts, *verbatim et literatim* put on the record, in the first and sixth count ; which sixth count differed from the first count in this, that it drew a conclusion in law, that the instrument had the operation of a bill payable to bearer. And yet the plaintiffs had fled from these two counts, and had taken refuge under the fifth and seventh counts

counts, which stated a transaction totally different.

He contended that the custom of merchants did not warrant the court to decide that it was a bill payable to bearer ; nor could they say that the legal operation of this instrument was different from the effect which they must have given to it on a special verdict.—If this was not maintainable in law, there was an end of every record in Westminster-hall.

He said, the reasoning which he meant to use on this occasion, did not, in the smallest degree, clash with the case of *Tatlock and Harris*. That judgment went upon the common counts.—In that case, the principle was this :—That the acceptor of the bill had received the full value of it :—he had got the money in his pocket and therefore it was held that he was bound, in conscience and equity, under the common counts, for money had and received to the use of the *bona fide* holder.

He took the case of *Tatlock and Harris* not to be founded on the custom of merchants.—The acceptor was not bound to pay, because the custom of merchants compelled him, but his obligation arose from the custom of equity and conscience, of faith and good dealing, though in the teeth of the custom of merchants. The defendant Harris, had received the money, and consequently he undertook to pay to the fair holder of the
bill

bill that sum of money which he had received from the drawer, who claimed this money equitably for money had and received to his use. For you, the acceptor, having received money for your acceptance, and you knowing that no such person as John White existed, and consequently that there was no legal order, you undertook for the money you received, to pay that money back again to the holder of the bill. Suppose, that in this particular instance, the defendants Gibson and Johnson had received value for their acceptance ; and suppose, that although they had received value for their acceptance, and had been charged under the common counts, they had set up against a *bona fide* holder, (which he took the plaintiffs to be, as they were ignorant of the whole transaction) that this was not a bill according to the custom of merchants,—what answer would have been given ? You say this is not a transaction according to the custom of merchants.—I answer, it is not the act of the acceptance which binds you,⁴ but the money received in consequence of the acceptance. You are charged, in an equitable action, for money in your pocket, which according to equity, conscience, and good faith, you cannot keep, but must deliver over to the plaintiffs. This case, therefore, is not affected by that of *Tatlock and Harris*, which was merely an equitable claim the plaintiff had on the defendant, in consequence

consequence of money received, and not on account of his being the acceptor of the bill.

The question here is, is this a bill payable to bearer, drawn according to the custom of merchants?

Mr Erskine said he now meant further to expose the argument, that this was a bill payable to bearer.

He supposed that Minet and Fector, who were the immediate indorsees from Livesey, Hargreave and Co. instead of keeping the bill, and bringing an action upon it, had indorsed it, and paid it away to Child and Co.—that Child and Co. had indorsed it to Drummond and Co.—and that they had indorsed it, and paid it to him; could he have struck out all these indorsements? What appearance would this have had on the custom of merchants?—How was it possible for this bill all of a sudden, to become a bill payable to bearer, after it had gone through the hands of the most eminent merchants, not as bearers, but from order to order?

It seemed to him rather a precipitate conclusion to say that you might declare according to the legal effect of an instrument. He meant to deny that proposition, and to produce his authorities.—If he admitted this proposition, then a bill of exchange might be pronounced to be, according to the custom of merchants, as payable to bearer, though drawn corruptly and
fraud-

fraudulently in favour of a fictitious person, whose name was feloniously forged by an indorsement, and accepted by the defendants, who feloniously conspired with the drawers.—if such a piece of paper, branded with forgery and fraud, was, in law, and according to the custom of merchants, a bill payable to bearer, the most mischievous consequences to commerce must necessarily ensue. Mr. Erskine was proceeding in his argument, when

Lord Kenyon asked him whether it had not been held that an action might be maintained on such a note as this :—"Received of *A. B.* one hundred pounds, which I promise never to repay."—was not this declaring according to the legal effect of the instrument ?

Mr. Erskine said, if this doctrine was true, then the first count also of the declaration was good. If he was driven to the first count, he should shew it was impossible this count could stand, in point of law.

He argued upon this part of the subject with vast ingenuity, and concluded with observing, that if the plaintiffs were entitled to recover, it just came to this proposition : That a bill, branded with fraud and forgery, was a bill, according to the custom of merchants, payable to bearer.—An acceptor, who had received the money, was bound, on the solid principles of equity, conscience.

science, and good faith ; which thank God, were the great pillars of the law of England.— Their Lordships were now upon a question of very great importance.

Mr. Justice Buller said, his present opinion was, that the Court could not direct the verdict to be taken on any other count but the fifth, which made it payable to bearer. The first count went on the idea that this was an indorsable bill and that the property was transferred by indorsement. His opinion was, that this was not an indorsable bill, but a bill payable to bearer.

Lord Kenyon said, this cause was of vast importance ;—it involved in it property to the amount of a million ; and was therefore one of the greatest questions, in point of value, that ever occurred.

Mr. Bencecroft observed, that this was a question of great magnitude.—He wished it to be on the record.—Their Lordships would observe, that if it were put in the shape of a special verdict, they were all agreed about the facts. The Court had now brought it to that point where he always thought it ought to be.—As it was intended that this question should go to the House of Lords, it was of consequence to his clients to have it carried there as soon as possible.—He hoped,

hoped, that for the purpose of putting it on the record, their Lordships would send it to a new trial.

Mr. Mingay said, he would rather have a special verdict at once.

Mr. Erskine had no objection that the facts should be agreed upon by the counsel ; who, if they were at any loss, might have recourse to the notes of the Chief Justice.

Mr. Bearcroft said, after the facts of the special verdict were found, the question would be,—Whether these facts supported any, and what counts ? Or, in other words, whether, in point of law, the plaintiffs could recover on any of the counts of the declaration.

The counsel in this cause agreed on a Special Verdict, as follows ; viz.

“ That the said persons using trade and commerce as copartners, in the copartnership name and firm of Livesey, Hargreave and Company, on the 18th day of February, 1788, at the place within-named, made a certain instrument in writing, (the hand of one of the said copartners, on their joint account, and in their copartnership name and firm of Livesey, Hargreave and company, being thereunto subscribed) and
directed

directed the same instrument to the said Thomas Gibson and Joseph Johnson, by the names and description of Messrs. Gibson and Johnson, Bankers, London ; and which said instrument is in the words and figures following, to wit :

Manchester, Feb. 18, 1788.

£.721 5s.

Three Months after Date, pay to Mr. John White, or Order, Seven Hundred Twenty-one Pounds, 5s. Value received, with or without advice.

LIVESKY, HARGREAVE & CO.

To Messrs. Gibson and Johnson,

Bankers,

G. & J.

London.

And the jurors aforesaid, upon their oaths aforesaid, further say, That the said Livesey, Hargreave and company, at the time of making the said instrument, well knew that no such person as John White, in the said instrument mentioned, existed. And the jurors aforesaid upon their oaths aforesaid, further say, That afterwards, — at the day and place within-mentioned, a certain indorsement in writing was made by the said Livesey, Hargreave and Company, upon the said instrument, purporting
to

be the indorsement of John White, named therein, and to be subscribed with his hand and name: And, that the said indorsement purported to require the said sum of money in the said instrument contained, to be paid to the said Livesey, Hargreave and Company, or their order. And the jurors aforesaid, upon their said oaths further say, That the said instrument being so indorsed as aforesaid, they, the said Livesey, Hargreave and Company, afterwards, at the day and place within-named, by a certain indorsement in writing made upon the said instrument, and subscribed with the hand and name of one Abfalom Goodrich, by procuration of the said Livesey, Hargreave and Company, appointed the said sum of money in the said instrument contained, to be paid to the said Hughes Minet and James Peter Fector; and then and there delivered the same so indorsed, as well with the name of the said John White, as with the name of the said Abfalom Goodrich, to the said Hughes Minet and James Peter Fector, for a full and valuable consideration in money, therefore then and there paid by the said Hughes Minet and James Peter Fector, to the said Livesey, Hargreave and Company. And the said Hughes Minet and James Peter Fector, then and there became, and were, and still are, the holders of the said instrument. And the jurors aforesaid, upon their oaths aforesaid, further say,

say, That the said instrument was afterwards, at the day and place within-mentioned, presented to the said Thomas Gibson and Joseph Johnson, for their acceptance thereof, and that the said Thomas Gibson and Joseph Johnson then and there accepted the same; they the said Thomas Gibson and Joseph Johnson, then and there well knowing that no such person as John White in the said instrument named, existed; and that the name of John White, so indorsed thereon, was not the hand-writing of any person of that name. And the jurors aforesaid, upon their oaths aforesaid, further say, That the said Thomas Gibson and Joseph Johnson, at the time of making and accepting of the said instrument as aforesaid, had not, nor had they at any time since, any money, goods, or effects whatsoever, of or belonging to the said Livesey, Hargreave and Company, or of the said Hughes Minet and James Peter Fector, in their hands. And the jurors aforesaid, upon their oaths aforesaid, further say, that the said Thomas Gibson and Joseph Johnson, although often requested, have not paid the said sum of money contained in the said instrument, or any part thereof, to the said Hughes Minet and James Peter Fector, or either of them, and that the same still remains unpaid; but whether upon the whole matter aforesaid, found by the said jurors in manner

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aforesaid,

aforesaid, the said Thomas Gibson and Joseph Johnson are liable to the payment of the said sum of money in the said instrument mentioned, or not, the said jurors are altogether ignorant, and pray the advice of the Court here, in the premises. And if, upon the whole matter aforesaid, found by the said jurors in manner aforesaid, it shall appear to the Court here, that the said Thomas Gibson and Joseph Johnson are liable to the payment of the said sum of money in the said instrument mentioned, then the said jurors upon their oaths say, That the said Thomas Gibson and Joseph Johnson did undertake and promise, in manner and form as the said Hughes Minet and James Peter Fector by their declaration have declared against them. And they assess the damages of the said Hughes Minet and James Peter Fector, on occasion of their not performing the promises and undertakings within specified, over and above their costs and charges, by them about their suit in that behalf expended, to £.721 5s. And for those costs and charges to 40s. But if, from the whole matter found by the jurors, in manner aforesaid, it shall appear to the Court here, that the said Thomas Gibson and Joseph Johnson are not liable to the payment of the said sum of money in the said instrument mentioned, then the said jurors upon their oaths say, That the said Thomas Gibson and Joseph

Joseph Johnson did not promise and undertake in manner and form as they have within by their plea alledged.

In Michaelmas Term, 1789, this Special Verdict came on to be argued in the Court of King's Bench ; and the Court thereupon gave Judgment for the Plaintiffs, upon the fifth Count of the Declaration ; and for the Defendants on the other Counts.

HOUSE OF LORDS.

IN ERROR.

THOMAS GIBSON *and* } *Plaintiffs in Error.*
JOSEPH JOHNSON, }

A N D

HUGHES MINET *and* } *Defendants in Error.*
JAMES PETER FECTOR, }

CASE FOR THE PLAINTIFFS IN ERROR.

UPON the judgment of the Court of King's Bench, a writ of error was brought, returnable in Parliament; and the plaintiffs in error having assigned general errors, and the defendants in error having pleaded that there was no error in the record of the proceedings, the said plaintiffs in error hoped that the said judgment would be reversed, for the following, among other

R E A S O N S.

First. Because by the law and custom of merchants there are two species of negotiable instruments, or bills of exchange, essentially

First. essentially different in their natures, the one payable to order, and the other to bearer; the former being only negotiable by indorsement, and the property in the latter being transferable by mere delivery.

Second. Because instruments of this description are in the nature of specialties, and are by law permitted to be declared upon as such; and the count upon which the Court have given judgment, setting forth and stating a bill payable to bearer, when the bill or instrument produced in evidence, purports to be a bill payable to order, is not supported by the evidence.

Third. Because the legal effect of every instrument must arise out of, and be collected from the words of it, and no parole evidence, or extrinsic circumstances, can give to it a meaning or operation contrary to, or different from that which appears on the face of the instrument itself.

Fourth. Because in the case of instruments, the property of which passes by indorsement, it is peculiarly necessary, that there should be persons in exist-

Fourth. ence, answering to the names indorsed upon such instruments, in as much as additional credit is derived to them from the number of indorsements made upon them; the consequent appearance of their having passed through an extensive circulation, and the apparent liability therefore, of a greater number of persons to the payment of the money contained in them.

Fifth. Because the facts found by the Jury, amount to the statement of a fraud and forgery, which can never give legal effect to an instrument, nor be the foundation of a contract within the custom of merchants; which custom must be founded in convenience, be consistent with reason, and sanctioned by usage: And consequently, as the count on which the judgment for the defendants in error is given, declares on a bill drawn according to the usage and custom of merchants, the evidence does not support such declaration.

Sixth. Because judgment being given for the plaintiffs in error, on those counts which specially state the circumstances

Sixth. stances that have been found by the Jury, it follows, that they are entitled to it on that count, to the support of which, the facts so found are the only evidence ; otherwise it must be decided, that a transaction, which stated upon the record in an action upon the case, is not sufficient to found a contract, or to make the party charged liable ; will, when found specially by a Jury, and put upon the record in the shape of a Special Verdict, be sufficient to found a contract, and to support a count, stating a contract of a different nature.

T. ERSKIN

F. BOWER.

T H E C A S E

OF THE

DEFENDANTS IN ERROR.

THE Defendants in Error humbly hoped, that the judgment of the Court of King's Bench would be affirmed, with costs, for the following, among other

R E A S O N S.

First. It appears by the Special Verdict, that the defendants in error are fair, *bona fide* holders of the bill in question, for a valuable consideration; and Livesey, Hargreave and Company, the drawers, at the time when they drew the bill, as well as the plaintiffs in error, Messrs. Gibson and Johnson, when they accepted it, are found to have been perfectly informed of the

First. the non-existence of White, to whom, or to whose order, the form of the bill makes the contents of it payable. The defendants in error therefore, are in a situation which entitles them to all the aid which, consistently with established legal principles, can be given by a court of Justice: And the plaintiffs in error having acted under no mistake or apprehension, and not being in any respect interested in the existence or non-existence of White, have no equitable claim to be released from the effect of their engagement, or to prevent the application of any favourable rule of construction to support the demand of the defendants in error.

Second. It is not necessary to the validity of deeds or contracts, that they can in all cases operate according to the words in which they are expressed; when the rules of law prevent such operation, the instrument may legally operate in a different manner, to give effect to the legal intent of contracting parties. Thus words of demise may operate by way of confirmation; and, *vice versa*, words of grant,

Second. grant by way of covenant;* and so in many similar instances. The intent of the drawers and acceptors of the bill in question, was to make a negotiable instrument; and if for want of an actually existing payee, nominated in the bill, it could not be so indorsed as to be put into a state of negotiability by indorsement, it is humbly conceived that there is no rule of law to prevent its being transferred by delivery, and having the effect of a bill expressed to be made payable to bearer, that being the only other method of negotiating bills of exchange: and it is also conceived that the fifth count of the declaration, which states the bill according to its legal effect and operation, is properly adapted to the case, and that the judgment thereon is warranted by the verdict. By thus giving effect to the bill, justice is done betwixt the parties, and the rule affords protection to the fair holder of bills of exchange, against frauds, by which they might otherwise be injured; without which protection, the currency of bills of exchange

* Co. Lit. 45. a Viner. Tit. Grants. (s.)

Second. change would be greatly obstructed, and great inconveniencies would arise in commercial transactions.

Third. It is objected that the defendants in error make title to the bill through the medium of a felony; but, supposing the indorsement of the name of White to have been a felonious act, the present action is not brought against the person who committed the felony, or for the felonious act: and it has been decided, † that the *bona fide* holder of a stolen bill of exchange might maintain an action upon the bill, though it had been negotiated to him through the hands of the person who stole it.—In the present case, however, the question does not arise; for the verdict finds no intent to defraud; and, consequently, no felony is found, nor can be intended.

E. BEARCROFT,
J. MINGAY,
A. CHAMBRE.

THIS

† Peacock against Rhodes and another. Dougl. 611.

THIS Case was argued at the bar of the Lords, by Messrs. Erskine and Bower, for the plaintiffs in error, and by Messrs. Bearcroft, Mingay, and Chambre, on the part of the defendants in error.

After the arguments of counsel, the Lord Chancellor, on the 26th April, 1790, referred to the twelve judges these three questions, which comprehended the whole merits of this important cause.

- I.—Whether the making of the instruments declared upon, appears upon the Special Verdict to be so criminal, that the policy of the law will not suffer an action to be founded on such an indictment?
 - II.—Whether upon the matter found in the Special Verdict, the bill mentioned in the fifth count can be deemed in law, a bill payable to bearer?
 - III.—Whether the matter of the Special Verdict will sustain any other count in the declaration?
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On the 3d of February, 1791, the Judges attended, in the House of Peers, for the purpose of delivering their opinions on this great commercial cause.

Mr.

Mr. Baron Hotham delivered his opinion upon these three questions, which were submitted to the consideration of the Judges.—It seemed to him, that the matter found in the Special Verdict was sufficient to warrant their Lordships in saying, that the making of the instrument declared upon, was not so criminal that the policy of the law would not suffer an action to be founded upon it.

On the second question,—Whether the facts contained in the Special Verdict would sustain the fifth count of the declaration, that this was a bill payable to bearer;—he submitted to their Lordships, that it was impossible not to feel that the parties to this bill, the drawers and acceptors, notwithstanding their plausible endeavours, ought not to be permitted to avail themselves of their own fraud; an attempt which the law would in no case endure, much less assist. Unless, therefore, some stubborn rule of law stood in the way of the judgment of the Court of King's Bench, it ought, in his opinion, to be supported.—It was admitted, that many cases might be put, in which deeds and solemn instruments were not always to be construed, or to have effect, according to their obvious or literal import, but that they should have such an operation, as would carry the intent of the parties into execution, though contrary to the strict letter

letter of the instruments themselves. This principle of law, in his apprehension, would apply directly to the present case. The bill in question, imported to be a bill of exchange, payable to John White, or his order, but in truth and in fact, it was not so.—It never was, and it never could be so, because there was no such person existing as John White. This was a fact known to the acceptors as well as to the drawers; so that the bill, so viewed, was contrary to the principle that operated on deeds and other instruments; they must therefore have recourse to the intention of the parties, which, in the present case, was clear. It was impossible for the holders of this bill to prove their title through John White, who had no existence, and who the plaintiffs in error knew did not exist; and therefore when they accepted the bill, they must have intended to have come under an obligation to somebody, otherwise their acceptance was idle and absurd. If therefore they had accepted this bill, they should be bound by their undertaking; for it was a known rule of law, that no man should take advantage of his own wrong.

The difficulty on the form of the bill arose from no mistake, but from a deliberate and concerted act of the acceptors and of the drawers. But it was still in their power to give effect to this bill.—Should they then be obliged to do so? It might not be too much to say the acceptors

ceptors intention was, that it should be payable to the bearer ; for they knew the bill had no indorsement on it by John White ; they knew it came into the hands of Minet and Fector from Livesey, Hargreave and Co.—It was sent as a bill payable to bearer.

He contended that it was not possible for these partners in fraud to say, we have accepted this bill, but we meant nothing by it but to cheat all mankind. Nor should they be permitted to say, that it was not according to the law and custom of merchants.

He said, the great principle that he went upon was, that parties to a bill should not, any more than parties to any deed or instrument, take advantage of their own wrong. The plaintiffs in error having accepted this bill, with the privity that John White was a fictitious payee, and that the holders could not derive title through him, the law would presume that they intended that ceremony should be waved. That this bill might be paid, the law would conclude that it was the intention of the acceptors to pay it to any *bona fide* holder ; or, in other words, that it should be considered as a bill payable to bearer.

He conceived that such a construction would be most conformable to the import and effect which ought to be given to all commercial transactions, as well as to true policy and the principles

principles of substantial justice. It was of the greatest importance that men's undertakings should be executed, and their promises to pay, performed.

The rule of law, that a man's own acts should be taken most strongly against himself, extended to all engagements and undertakings. He conceived the acceptors of this bill would not be permitted to say, we never intended to pay. The law would hold them more strongly to their engagement, on the ground of their own fraud, and would consider the bill as capable of being transferred by delivery.

A bill of exchange amounted to no more than an authority on the one hand, in the person to whom it was made payable, to make a demand; and, on the other, to an undertaking by the acceptor that he would pay. The acceptor put himself in the situation which made it obligatory on him to pay the bill, either in the very terms of it, or according to its legal operation, as in this case, where the name of John White must be looked upon as nothing,—as a non-entity,—and the bill must be considered as payable to a real, existing person; that is, to the bearer.

He was of opinion that the judgment of the Court of King's Bench would afford a proper security to paper circulation,—would tend to the support of public credit, and prove most beneficial to the great interests of trade and commerce.

But

But the most fatal consequences must necessarily ensue, if the acceptors of bills were permitted to set up their own fraud as a justification, and were to refuse to pay any *bona fide* holder, for a fair and full consideration.

On this question, therefore, his Lordship was of opinion, that, upon the matter found in the Special Verdict, the bill, as mentioned in the fifth count, might be considered as a bill payable to bearer.

But thirdly, suppose the facts found by the Jury, and stated in the Special verdict, would support the fifth count, which described the bill as payable to bearer, there was a third question to be considered,—Whether the matter in the Special Verdict would sustain any other count in the declaration? his Lordship was of opinion that it would also sustain the first count, by considering the bill as a new bill, by the subsequent indorsement of Livezey, Hargreave and Co.—For every indorsement was in the nature of a new bill, and had the same effect as if they had originally drawn the bill, without the name of John White, payable to themselves, or their own order. From the moment, therefore, this second indorsement appeared on this bill, Livezey, Hargreave and Co. gave a new title to it, and a fresh authority to pay to their own order. The acceptance of Gibson and Johnson was subsequent

G

to

to such indorsement; and therefore that acceptance, he conceived, must be coupled with the knowledge which they were bound to have of this second indorsement by Livesey, Hargreave and Co.—and knowing that, although there was on the bill a fictitious indorsement, there was also on it a real one. In that view of it, his Lordship considered the acceptors as liable under the first count.

Mr. Baron Thompson, Mr. Baron Perryn, and Mr. Justice Gould, were of the same opinion with *Mr. Baron Hotham* on all the three questions.

As there was no fraud disclosed on the face of the Special Verdict,—as it was not stated that the parties had made this instrument with an intent to defraud, they, the Judges, could not infer it.

On the second question they were of opinion that the Special Verdict would sustain the fifth count of the declaration,—that the legal import of this instrument was a bill payable to bearer. By this construction no violence was done, since the persons entitled to the money had a right to recover on the bills. Every person who had to do with paper of this kind should be answerable to the *bona fide* holders. Their Lordships were therefore of opinion, that the Court of King's Bench had a sufficient foundation for deciding as they

they did, and that therefore their judgment ought to be affirmed.

At to the third question, their Lordships were of opinion, that the matter found in the *Special Verdict* would also support the first count in the declaration.

The Chief Baron next delivered his sentiments, and said,—With respect to the criminal nature of this instrument, there was enough perhaps to have warranted both the drawers and acceptors to have stood at a different bar; but as this did not appear on the face of the *Special Verdict*, the policy of the law would not suffer Judges to infer it. Upon the first question therefore they were all agreed; and for that reason he should forbear saying more upon this preliminary point.

He next adverted to the different counts in the declaration, and thought there was not a pretence for saying that the matter of the *Special Verdict* could sustain any of the counts, except the first, second, fifth, and sixth; and that therefore the enquiry was reduced to this, whether this *Special Verdict* would support any one of these four counts. This would include every thing that remained on the second and third questions.

The Court of King's Bench were of opinion, that neither the first, second, nor sixth count,

could be sustained, in point of law; and this would be material on the argument on the second question. The Court gave judgment on the fifth count, and thereby decided, that when a bill was made payable to a fictitious payee, the contents of that bill became payable to bearer. He conceived it would be extremely difficult to make out that this was a bill payable to bearer. For the Facts found by the Special Verdict were in direct opposition to the facts stated in the fifth count. And first of all, he presumed it must be admitted, that before Minet and Fector could recover on this bill, they must shew, in like manner, as every other plaintiff must shew, a sufficient title. And in his judgment, there was a fundamental fallacy in the arguments used by the learned Judges on the other side, arising from not observing this proposition.—The plaintiffs must prove their case, and make out their title, before the defendants were called upon to say any thing.

Bills of exchange being of several kinds, the title to recover on any bill must depend on what kind of bill it was.—A title to recover might be derived either from the drawers, or from the original payee. In this case, the title of the original payee was apparent on the face of the bill. The title derived from that payee was a title by assignment, a title which the common law did not acknowledge, and, as he apprehended, could

not

not make ; a title which existed only by the custom of merchants. If, by force of the custom of merchants, this was a bill payable to order, the assignment must be by a writing on the bill, called an indorsement, appointing the contents of that bill to be paid to some third person. Every man could easily discover whether the holders of a bill claimed it under an assignment as indorseees or as bearers. The title of the bearer appeared on the face of the bill,—the title of the indorser appeared from the indorsement. Every thing that was necessary to be known respecting a bill of exchange, whether it was assignable by the custom of merchants, and whether it had in fact been assigned, according to that custom, would appear at once, by a fair inspection of the instrument itself. The foundation of the right of a holder of a bill payable to bearer, was his being in possession of the bill when he claimed title to it.

In his Lordship's apprehension, the wit of man could not devise anything better calculated for circulation.—The assignable quality of a bill was a thing created in the original frame and constitution of the instrument ; and the party to whom it was offered had only to read it. If a man claimed to be entitled to a bill of exchange, drawn in favour of a real payee, and not having an indorsement by that payee, he could not re-

cover on it, as on a bill of exchange, though he had paid a full consideration.

The present bill should, if possible, be taken to be what it imported to be on the face of it, and ought not to be governed by any private circumstances. The plaintiffs declared on it as a bill of exchange, and had stated their title to that bill to be by assignment; and the custom of merchants directed that this assignment should be by indorsement; and, supposing the payee was a real person, it would be impossible to be transferred in any other manner. But they said, in this case, that John White was a fictitious name, and that his indorsement was likewise fictitious. They said this fact was known to the acceptors; by reason whereof, and by the force of the custom of merchants, the acceptors became liable to pay the value of the bill to them. His Lordship said, he had looked in vain to discover where the places were to be found of this usage and custom of merchants applying to such a case. He apprehended that no logician could draw such a conclusion from such premises; he asked where that rule was to be found. If no such rule was to be found expressly laid down, was it to be collected from inference?—No rule had been stated, to his apprehension, that warranted such a conclusion.

It was only by force of the usage, and custom of merchants that Minet and Fector could ever re-
cover

cover on this instrument, as on a bill of exchange. The common law could never recognize their title.

His Lordship was of opinion, that this instrument was only a piece of waste paper, upon which the custom of merchants never attached.

He thought that the drawers of the declaration had not made the best use of their materials,

It had been stated, that every indorsement was a new bill. He could have conceived in a case where there was no original payee, if they had declared on a new bill drawn by those who made the second indorsement, appointing the contents of the bill to be paid to the parties to whom the second indorsement was made, that there would have been some authority for saying this amounted to a new bill.

It had been contended on the other side, that this was a bill payable to bearer. In his Lordship's apprehension, such a bill was a mere nullity. It was not surely a very sound argument, to say, that this must be a bill payable to bearer, because it could be payable to no other man. If the intent of the parties was to be collected from what appeared on the face of the instrument, they must consider it as a bill to pass by indorsement. Where then was the authority for saying, that it was according to the effect and meaning of the bill, that the contents should become payable to bearer? The fifth count, therefore, had

very great difficulties to encounter. How they could make that, which upon the face of it plainly purported to be a bill of exchange to pass by indorsement, a bill payable to bearer, he confessed he was totally at a loss to comprehend.

It had been said, that the plaintiffs in error, Gibson and Johnson, should never be permitted to defend themselves, by alleging that the payee was fictitious. He was ready to admit, that by the law of England, no man should be permitted to allege his own crime; and, in that sense, he agreed that no man should take advantage of his own fraud, nor should set it up by way of defence. But still a plaintiff must always recover by his own strength. He must prove his case, and when that was done, it should not be permitted to a defendant to set up his own fraud, to insist that the payee was fictitious, and to shape that into a defence to answer the plaintiffs case.— But here the plaintiffs, in making out their own case, were driven to shew the facts which the defendants, by way of defence, were attempting to shew against them. Where the plaintiffs could not make out a fair, *bona fide* case, the defendants were not bound to say any thing.

Unless this instrument could be shewn to be a bill payable to bearer, against all the world, it could never be shewn to be a bill payable to bearer against Gibson and Johnson.

It

It had been said, that by the judgment of the Court of King's Bench, the plaintiff was not robbed of his title, and the parties were not permitted to avail themselves, of their own fraud. He was of opinion that it would be much better to punish fraud in a direct way, than in this indirect manner. This was a mode of procedure which he thought very dangerous.

It had been likewise stated, that there was an analogy between bills of exchange and deeds; and that the same sort of construction was applicable to both. It ought to be observed, that deeds, by the common law, had a certain operation and construction. Bills of exchange were instruments which derived their effect from the custom of merchants. But supposing there was some analogy between bills of exchange and deeds, would it from thence follow that a bill payable to order, could be construed into a bill payable to bearer?

There were certain words in deeds, which had a certain sense and known construction, according to their plain, obvious, and common import. In reading a page of history, in any language, he who read it would interpret the words according to the meaning which they usually had in that language. His Lordship said, if judges went one step beyond this, they did not construe men's deeds, but made them. It was a fallacious argument to apply the rules of the common law

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to the law of merchants. The fallacy consisted in this, that the distinction between the common law, and the law of merchants, had not been sufficiently attended to. It had been said, that bills of exchange ought to be supported. They certainly should; but if a man would demand payment of a bill of exchange, according to the law of merchants, he must bring his case within that law.

The defendants in error were supposed to be innocent indorsees; and therefore it was said it was an extremely hard case upon them. But the law ought not to be stirred, much less altered, to suit this hard case. It became a hard case only by the accidental insolvency of the different parties. This was a hard case on them all.

A bill payable to a fair payee, and coming back again to the drawer, had done its duty, and ought to have been cancelled.

His Lordship said, these circumstances had weight with him, after a very careful investigation of this case.

He confessed himself to be a very incompetent judge of the interests of commerce.—He might be ignorant on this subject, but he took the interests of commerce to be deeply concerned to support fair credit, and to discountenance false credit. He took it, that the interests of gentlemen who dealt in the discounting of paper money, and the interests of commerce, were not
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exactly the same. Trade might receive a deep wound from the failure of a number of capital houses, when the dealers in paper might receive twenty shillings in the pound, by proving their debts under twenty different commissions. While their Lordships were attending to the interests of the holders of bills, circumstanced like that under consideration, they ought not to forget the interests of the trade and commerce of the country. To support such instruments as this, was to encourage a spirit of loose adventure,—a spirit of gaming in commerce,—a spirit of fraud of every kind, the weight of which must necessarily cramp and depress every honest man, who traded on his own capital.

Said his Lordship, let us not deceive ourselves.—No evil can arise by giving judgment against these bills; but if such bills are recoverable in a Court of Law, there will always be found people who will avail themselves of the advantages to be derived from the negotiation of such bills;—this paper money will go on, and where the mischief will end, no man can foresee.

He said, these were the ideas he entertained upon this important cause.

He was clearly of opinion on the second question, that the facts found by the Jury, and stated in the Special Verdict, were not sufficient to support

port the fifth count in the declaration, which set out this bill as a bill payable to bearer.

And, thirdly, his Lordship was of opinion, that the matter in the Special Verdict would not sustain any other count in the declaration. For these reasons, his Lordship concluded with giving it as his opinion, that the judgment of the Court of King's Bench ought to be reversed.

Mr. Justice Heath concurred perfectly in opinion with the Chief Baron, and argued nearly on the same principles.

The Lord Chancellor said, at this late hour of the day, he should not trouble their Lordships with his opinion on this cause, which was of immense importance. Four of the learned Judges had been of opinion, that this declaration might be supported on the first, and also on the fifth count. It would be proper to consider, whether this was not a construction in terms contradictory. If this was to be supported as an assignable bill of exchange, he took it, that it could not be a bill payable to bearer, and, *vice versa*. They must, therefore, make an election, and say whether it was a bill payable to bearer, or a bill payable to order. It was impossible it could be a bill payable to both. He did not so much as hint an opinion at present

present to their Lordships on this intricate business.—As the opinion of these four learned Judges would require some explanation before judgment could be given, he moved, that the further consideration of this cause be postponed till a future day, which was accordingly carried.

ON MONDAY, the 14th *February*, 1791, this business came on again in the House of Lords; when *Lord Kenyon* rose first, and delivered his opinion.

His Lordship began with observing, that this question was of extreme importance to the parties concerned, as well as to the public. The question was, whether upon this bill of exchange the plaintiffs had a right to recover:—If their Lordships could support this bill according to the nature of the contract, undoubtedly they would be glad to do it, and make it subservient to the honesty of the case.

There being no such person as John White existing, a title to this bill could not be deduced conformable to the very words of the instrument. In order to make out a title to the bill, the indorsement of John White must be proved. This could not be done in this instance, because the Special Verdict had found that no such person existed. If there were positive rules of law, which said that no instrument could operate at all, unless it operated in the very terms in which it was written, melancholy indeed must be the case of many persons. One of the learned Judges who discussed this bill very much at length, cautioned the Judges against removing the landmarks of the law, and that it would be much better that all these bills should fall to the ground, than that there should be the least danger

danger of any thing of this sort.—Another learned Judge had observed, that they ought, to follow the temperate rules of law. His Lordship said, it was by such rules that he meant to square his conduct; and he hoped their Lordships would square their conduct by the same rules.

From the nature of this bill, it could not be negotiated in the terms in which it was drawn. The question was, whether there was any rule of law which prevented its being negotiated according to its legal effect and operation.

It had been asked, could any thing have effect that was founded in forgery? His Lordship said, that very far back bills, founded in forgery had an effect; and there were some late cases which fully recognized this doctrine.—If a bill was forged, and a party accepted it as a true bill, no man would say that it was competent for the acceptor to prove that this bill was forged.—There was nothing therefore in this part of the argument.—Were all instruments therefore so constructed as to have no effect? There was the case of a bill of exchange, which came extremely near to this, decided before Lord Mansfield, at *Nisi Prius*, in 1769. His Lordship held, in that case, that the holder was entitled to recover. Besides, this was agreeable to the ideas of all the most enlightened and respectable merchants of the city of London.

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In the case of a note to this effect :—"Received the sum of five hundred pounds, (or any other sum) which I promise never to pay ;"—his Lordship said an action had been brought upon such a note, and it had been held the holder was entitled to recover.

His Lordship observed, that he might reason by analogy from a variety of other cases that had been cited at the bar, and which had received no answer. Deeds operated in any manner, in order to effectuate the intentions of the parties.

His Lordship said, he was rather surprised at an observation made by one of the learned Judges, —that deeds admitted of a more lax construction than bills of exchange. This doctrine was new to him. In deeds that were intended to act on real property, and where the assistance, of conveyancers was called in, he should have thought as much strictness, at least, ought to be observed in the construction of instruments of that sort, as in bills of exchange, which were drawn by men of plain, common sense, who were engaged in trade, and who had no legal assistance.

It had been said, it would be very hard if some remedy were not to be given to the party who had paid a valuable consideration for this bill. But say they, the plaintiffs ought to have brought their action *ex delicto* against the acceptors.

His Lordship said, this was a remedy not negotiable in its nature ;—it could not be transferred,
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and died with the party who was guilty of the fraud. An action, *ex contractu*, was against the party entering into the contract, and did not die with him.

His Lordship said, he had always understood, in cases of fraud, that unless the Jury drew the conclusion, the law was not to admit it. The Jury not having found any fraud in the Special Verdict, it was impossible for the judges to say there was any fraud in the transaction.

His Lordship observed, that after all the consideration he had been able to give this case, he was still of the same opinion, and thought that the judgment of the Court of King's Bench ought to be affirmed.

The Lord Chancellor said, he did not propose to trouble their Lordships much at length with his sentiments on this subject.—He flattered himself that he should meet with the forgiveness of the House, if he addressed himself principally to those whose experience and habits had been chiefly pointed to legal objects.

This question did not turn upon any general rule of substantial justice, or upon policy, but it turned on the form of the action; and the question was, whether the plaintiffs method of complaining, and the mode in which they sought redress, did, or did not apply to their particular case.

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His Lordship said, that on this, as well as on the former day, when a number of the learned Judges delivered their sentiments on this cause, no doubt was entertained of the wisdom of the law, which had ordained specific remedies for specific cases.

He said, he had the misfortune to differ from those who had produced authorities in favour of this judgment, because he found himself unable to coincide with it.—He was extremely glad it had come to be heard before persons of so much knowledge, experience, and practice in the law, as to command their Lordships attention and acquiescence: for he was very ready to say, if those persons pronounced any thing to be law which he could comprehend, on their authority he should think himself bound to obey it.—He did not know how he could go further.—He had a personal knowledge of the noble and learned Lord who spoke last, and not of him only, but of the temper of all the Courts in Westminster-Hall. He knew the learned Judges were not so anxious to have their opinions thought right, on a new and intricate subject, as they were to lay down such principles as would apply to all such cases, and which would be an eternal rule on all subjects of a similar nature.

The case in the Common Pleas went on the same point with this.

His Lordship said, he wished to go to that which was the true point in the cause. It would
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be proper for him, who had the misfortune to differ in opinion from so great a number of Judges, to state the grounds of that difference:— This was not an easy task, considering the very nice arguments that had been used.

His Lordship adverted to the Special Verdict: He said, Livesey, Hargreave and Co. made something in the form of a bill of exchange, drawn upon Gibson and Johnson, and payable to the name of John White, or order. He supposed the name of John White would suit fifty people, in every county of England. But their Lordships were not to consider it in that point of view, because the Jury had found that no such person existed. After this thing was so drawn, the name of John White was indorsed upon it by the drawers themselves; after it had been so indorsed, the drawers indorsed it again, and paid it into the hands of the present plaintiffs.— By the Special Verdict, the plaintiffs were not found to have any cognizance of the fraud.— The bill being drawn in this way, it was important to say, whether there was no fraud. All the Judges who were in favour of the present decision, were of opinion there was no fraud, because none was stated in the Special Verdict.

The reason of making it payable to their own order, under the name of John White, was in order to give it a greater degree of currency, and a more extensive circulation. It was to give coun-

tenance to a thing which was unreal, and which, in his Lordship's apprehension, must be deemed a fraud. Livesey, Hargreave and Co. likewise wrote the name of John White on the bill. The plaintiffs held this bill by assignment. There was a distinction between bills. One set of bills was payable to order, and by the custom of merchants might be assigned, though by the common law they could not. The person who put his name on the back of a bill was an indorser, and he warranted the bill so far, that if an action was brought against him, stating him to be an indorser, it would be good, if the indorsement was proved to be his hand writing; even if all the matter were found that had been found in the present case. In an action against an indorser, it was immaterial what the bill was before the indorsement, since the indorser warranted it. One of the learned Judges, in observing upon bills payable to bearer, seemed to think, if he understood him right, that they passed by assignment, and the difference between them and bills payable to order, consisted in this; that in the last case the assignment was by writing; in the first case, by delivery.

His Lordship conceived that this was a mistake. The bearer of a bill of exchange, did not claim through the hands through which it came. This was not material to the undertaking of the acceptor. His undertaking was to pay to the bearer ;
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and if the bill had passed through an hundred hands, the last bearer was as much the original hand, as if it had never been in the possession of any other person.

This was the difference between bills payable to order, which passed by assignment, and bills payable to bearer, which did not pass by assignment.

The Special Verdict had stated most of the facts necessary to be ascertained, except one, which would have been very material, and that was, whether Gibson and Johnson, at the time they accepted this bill, knew that the defendants in error had paid the drawers value for it. In consequence of accepting this bill, the acceptors came under all the obligations to pay it which the nature of the instrument required.

The thing which fell first to be explained, was,—What was the true construction of the law upon this instrument, with respect to all the parties who had entered into this transaction? What obligations did they come under, either to the public or to the individuals concerned in the bill? His Lordship confessed, that this appeared to him, to be a very material article in the inquiry. The learned Judges had confined their answers too closely to the mere matter of the Special Verdict, and had not given him that satisfaction which he expected on this part of the case. Some of them had hinted, that if a forgery had

been stated in the Special Verdict, this might have altered the case; and one of them doubted whether the acceptance would be a forgery, although the bill were found to be a forgery with respect to the drawers. Yet, as on the Special Verdict no forgery was stated, nothing of this sort could be implied. His Lordship took it to be for the safety of mankind, that the forms of law should be properly observed, and that nothing should be assumed beyond what was expressly found by the Special Verdict. Though the evidence was ever so cogent, a court of law could not draw the conclusion: it must be done by a Jury. The Jury had found no fraud by their Special Verdict; and consequently, the Judges must say, there was nothing unfair in the transaction.

He said this was a melancholy case, with respect to the parties. For whatever became of this bill, with respect to the very next bill that came before the court, it must be decided whether this was, or was not a forgery: whether the putting the name of John White, or any other forged name upon a bill of exchange, was not matter within the statute. This was a thing which he could have wished had been stated.

This, therefore, must be found.—It must be known, whether it was possible for those who call themselves merchants, to put fictitious names, or the names of any other persons on bills, and to write those names themselves,

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The second count said, that John White was a real person; and the drawers took the freedom to indorse his name, being the name of a real person.

His Lordship said, He should have liked to have known how far this sort of instrument was, or was not to be considered as made for obtaining money under false pretences.

After the best consideration he was able to give this case, he thought the first count came extremely near the point. If the defendants in error had given money to the drawers for this bill, and the acceptors had known that they had done so, and on that account had accepted the bill, he conceived this would have been an undertaking to pay the debt of another :—For, in that case, the drawers would have been indebted to the holders, and the acceptors would have been apprized of that circumstance; and the consideration would have been, that they, by interposing their credit, would have prevented the holders from going back on the drawers. It would not have been a *nudum pactum*.

His Lordship thought that the criminalty of this instrument, ought to prevent the holders from bringing an action on it. He was rather inclined to go on the fair and clear rules of law, let the loss fall where it would, than to strain a rule of law to do substantial justice in a particular

case:—For by this you did a great deal more harm to the public, than you did good to individuals.

The next question that arose in this inquiry was,—Whether this was a good bill on the 5th count? And here, even his noble and learned friend, who spoke last on this subject, had disappointed him. He thought it material to know when this instrument began to be a bill payable to bearer. Did it begin, in the language of the sixth count, after it came into the hands of the holders, and before they carried it to the acceptors?—Suppose the holders of this bill had known that John White was a nominal person at the time they took it; he should wish to know whether, in that case, it would have been a bill payable to bearer. He wished also to know, if this bill had been lost, and had got into the hand of a stranger without any of those names upon it, whether that stranger could have come to the acceptors and demanded payment. Could he have recovered in an action against the acceptors, and have put the indorsement out of doors?

His Lordship thought it was a considerable stretch to make this a bill payable to bearer. It was not very agreeable for him to contend against an authority which he felt overwhelming him at the very time he was speaking.

As a measure of general policy, it was of extreme importance that transactions of this kind should be stopped. Fictions on bills would be
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the constant course, if their Lordships made such bills payable to bearer.

With regard to its being a hard measure, he observed there must be some remedy. The law always found a proper remedy for every injury.

He said he had reduced the question fairly to this ground :—Was it ever, according to the avowed policy of the law of England, that the contents of a bill of exchange should be proved by anything but by the words of the bill? He conceived that no bill could have a sense introduced upon it but what was agreeable to the words of the bill? and it was from having deviated from that rule, that he found fault with the present judgment. If they said that a bill of exchange was what it purported on the face of it to be, the holder knew what he had to expect, and would not be afraid of advancing his money :—But if they held that a bill, which on the face of it appeared to be payable to order, was a bill payable to bearer, it was impossible for the holder to know what would happen. The Court of King's bench had given a judgment on this bill contrary, not only to all the notions which the holders had on the subject, but contrary to every expectation which they could possibly entertain when they took it. They took it as a bill payable to order, and by accident it turned out at last to be a bill payable to bearer :—*Præter spem, et præter voluntatem eorum.*

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It had been humorously observed, that you could not tell what a WILL was, till it had gone through the House of Lords; but he had never heard this said of a bill of Exchange. Many authorities had been quoted, and there was not a greater than that which he was now disputing—the Court of King's Bench,—an authority to which he was constantly resorting for assistance.

His Lordship next adverted to the *nisi prius* decision of Lord Mansfield, in 1769. The note which he had got of that case, he said, was somewhat different from what had been stated.

His Lordship conceived that case did not apply to the present; because Lord Mansfield said, that he would not permit parties to avail themselves of their own fraud; and held, that the instrument should be considered to be what it purported to be on the face of it. But in the present case, the direct contrary was attempted. They wished to convert a bill, which on the face of it purported to be a bill payable to order, in to a bill payable to bearer. He conceived, that more authority had been given to that case than Lord Mansfield intended. He thought, if this judgment could be maintained at all, it must be on the first count, which had stated the whole matter of the Special Verdict. If he were to support the judgment on any count, he should wish to support it on the first. It was not a bill
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of exchange, assignable according to the law and custom of merchants, but it was an undertaking.

It had been said, this judgment might be supported from analogy to the conveyances of real estates. If so, they might make a bill of exchange different from what the substantial justice of the case required it should be made, in order to give the plaintiffs a means of recovering. He thought this proposition was monstrous, and infinitely too large to be maintained.

Bills payable to order, and bearer were two totally different things.

In deeds, there must be certain words used, as *dedi, concessi*, &c. and without them the conveyance would be void. There must be a subject grantable;—there must be a person capable of granting;—and there must be a person capable of receiving.

In like manner he conceived there must be a certain form of words used in bills payable to order, and a different form in bills payable to bearer. It must appear clearly on the face of the bill, whether it be a bill payable to order, or a bill payable to bearer.

It was upon these grounds that he entertained doubts on this subject, and differed in opinion from those who thought the judgment ought to be given on the fifth count. His Lordship conceived it was impossible the judgment could be sustained on the first count. He saw no ground on which it was possible to affirm this judgment:
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and if it was affirmed, their Lordships ought not to forget the numerous inconveniencies that would attend the transactions of commercial men. Who was to know that John White was a mere fiction? When was this to be known?—When the holders come against the acceptors, they refuse payment, and stand an action:—and at last the holders are told that the instrument which they took as a bill payable to order, was a bill payable to bearer. Let it be fraud, or not fraud, to make such an instrument, it must be an assignable bill. The acceptors should not be allowed to urge fraud in their own defence: they should be bound by the fraud: They should be tied down to their transaction, as if it had been honest and *bona fide*. If the transaction had been honest, this would not have been a bill payable to bearer, but by assignment. He should urge no more arguments on this subject. He could not expect that any thing he had said could weigh with their Lordships, which contradicted the whole body of the law of England.

Lord Loughborough said, he had been repeatedly called upon to pronounce the best result of his understanding upon bills of this sort. After the very able opinions which he had heard,—and after balancing them in his mind with the utmost attention he could bestow, the effect was, that he still remained of the same opinion which it
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was his duty originally to deliver in the Common Pleas, to wit, that this instrument ought to be considered as a bill payable to bearer.

The Lord Chancellor, in the consideration of this case, had very properly put to the view of the Judges a question, antecedent to the discussion, on the merits. This question was,—Whether by the matter found in the Special Verdict, the acts done by the parties to this bill imported an utterance of it, knowing it to have been forged?

The answer that had been received was,—That from the matter found in the Special Verdict, it was impossible to say any forgery had been committed respecting the bill. One of the Judges had hesitated whether the acceptance amounted to an utterance; but the general opinion was, that there was no forgery on the bill. The ground on which the Judges delivered this opinion was incontestable. The Special Verdict did not state that the writing the name of John White upon the bill, was done with an intent to defraud any particular person.

It appeared to his Lordship, that the matter so found by the Special Verdict was enough to support the opinion of the Judges. He thought there was no fact found in the Special Verdict from which fraud could be collected; but he conceived there were circumstances found by the Special Verdict, which directly negatived that conclusion. On the Special Verdict
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the transaction was stated thus:—On the 18th day of February, Livesey, Hargreave and Co. made this paper in the form of a bill, and directed it to Gibson and Johnson, desiring them, three months after date, to pay to John White, or order, seven hundred and twenty-one pounds five shillings, for value received. After that, and before the bill was presented for acceptance, it got into the hands of Minet and Fector, for a valuable consideration. But a very material circumstance had taken place, by the drawers having indorsed it. The indorsement of the drawers was certainly unnecessary, with respect to the bill itself: but the Jury seeing the indorsement of the drawers, before the value of the bill was actually paid, thought it demonstration that no deception had been practised on the holders, but that it must have occurred to Minet and Fector that White was not in fact the payee of the bill; for that, if he had, it must have come from him, and not from the drawers to the holders;—and that it was impossible to account for its coming back again to Livesey, Hargreave and Co. if it had come out of the hands of the payee, which it must have done, had he been a real person. This demonstrated that it was completely indifferent whether White existed or not,—whether he was worth a sixpence or not,—whether he was to be found or not. Gibson and Johnson accepted it as the draft of Livesey, Hargreave,
and

and Co. with their indorsement upon it, as the indorsement of a bill that had never been out of their custody. Finding this bill brought to them with the name of Livesey, Hargreave and Co. upon it, as well as with the name of John White, they accepted the bill. Upon what ground, and under what circumstances did they accept it? Was it an acceptance to pay to the order of John White? They knew at the time, the name of White was nothing. They knew it was a bill that had come immediately out of the hands of Livesey, Hargreave and Co. and therefore they accepted it, to pay to the person who for value held it from Livesey, Hargreave and Co. that was, to pay it to whoever was the bearer

There was undoubtedly a distinction between bills payable to order, and bills payable to A, or bearer. The distinction was this, that bills payable to order must be assigned by the real payee. Such bills could never get back to the hands of the drawer but by being dishonoured : They passed by assignment.

A bill payable to bearer was such a bill, that any man who picked it up in the street, might maintain an action upon it. In the reign of King William there were opinions that he could not; but the Court of King's Bench afterwards decided that the bearer might bring an action in his own name. The state of this bill when presented for

for acceptance, negatived the idea that there was any such person as J. White. They knew the words, *John White or order*, were colourable only, in that bill.

There was a convenience in trade for merchants to be able to raise money ; and this was frequently done through the medium of bills of exchange. The bills were sent to market, and were negotiated by means of the brokers. The broker put a name upon them, and did not disclose his principal till he had found a person who would deal with him ;—the principal was then discovered who put his name upon the bill, and from the moment the buyer got that indorsement, he was perfectly indifferent.

It was found by the Special Verdict, that the bill in question was accepted by Gibson and Johnson after it was indorsed by the drawers.—From that instant, his Lordship denied that this was a bill payable any longer to the order of White, because the acceptors, at the time they put their acceptance to the bill, took White to be purely matter of form ; and therefore he was of opinion, that in its proper and legal operation and in the real and true state of the transaction between the parties, this was a bill which Gibson and Johnson undertook to pay to whoever should produce that bill to them with the indorsement of Livesey, Hargreave and Co. and

to whoever had paid a valuable consideration to the drawers.

It was in the power of Gibson and Johnson to qualify their acceptance in any manner they pleased.

Every indorsement operated as a new bill.

Livezey, Hargreave and Co.—who drew this bill on Gibson and Johnson, indorsed it; and what preceded that indorsement, was of no consequence.

An objection which had been stated by the Chief Baron, operated strongly upon his mind: but his Lordship thought he could answer it; it proceeded on a mistaken state of the question.—The Chief Baron conceived the question was, whether the plaintiff had made out his title to recover on this bill, and that the defendant was not obliged to move one step in the cause, till the plaintiff had produced evidence of an assignment made by White, by some circumstances that would amount to a proof against the person who disputed that fact. They must previously establish the fact, that an assignment had been made of that bill by John White, before they could call for payment.

His Lordship conceived, that the plaintiffs had proved distinctly and clearly their title to the bill, by proving they had paid value for it to the person from whom they received it.

A few considerations would make this sufficiently clear to their Lordships.

The defendants in error had proved they paid value for the bill to Livesey, Hargreave and Co. who indorsed it ; an action therefore would lie directly against Livesey, Hargreave and Co. Whether the name of White, or order, could be proved or not, an action might be brought against them as indorsers. For a long series of time, Courts had held that an indorsee might maintain an action against an indorser ; and it was upon this ground that an indorsement made a new bill. In the present bill, he could prove the drawers wrote the name of White with the privity of the acceptors.

Said his Lordship, Have I not made out my title ? It was in vain to say that he had not made out a proper title. He therefore met the difficulty that was suggested ; and the only question was, whether he had made out such a title as would give him a right to recover.

He confessed, where the justice of the case stared him fully and fairly in the face, he did not find himself pleased when he felt himself knocked down by an objection. He conceived that substantial justice was of much more importance than the beauties of special pleading.

This was an engagement, on the part of the plaintiffs in error, to pay to whoever should hold
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this bill, under the indorsement of Livesey, Hargreave and Co.

The next question which his Lordship put was, whether this was not, in fact and in truth, an undertaking to the bearer. It was not an engagement to pay *nominatim* to Minet and Fector, but to any person who could justify himself under an indorsement from Livesey, Hargreave and Co. The true effect of this bill, in every form in which it could be put was, that it was a bill payable to bearer.

He said, he had the disadvantage of addressing their Lordships without having had leisure to state his opinion with that accuracy and precision which he might have done, had he had an opportunity of committing his thoughts to paper.

There was certainly a difference between a bill payable to order, and a bill payable to bearer.—but what was this vast difference? The distinction was, that in a bill payable to order, the property was transferred by assignment; but by the common law, a bill was considered as a security for a debt, and was not assignable. This bill was never sent into the world as a bill payable to order;—for while it was in the hands of the drawers it was not, and the moment it was sent into the world, it was a bill payable to bearer.—It was no straining of law, to say, that this bill,

to all intents and purposes, was a bill payable to bearer.

His Lordship begged pardon for having gone so fully into this case, and for not having been able to state it with a little more method.

It had been said, if this judgment were affirmed, it would be productive of numerous inconveniencies.

His Lordship observed, that he durst not trust himself to look into futurity, to see what would be the consequence of checking this, or the utility of setting up a fictitious payee. If this was useful to merchants, and was prohibited by this decision, their Lordships only told people, instead of a fictitious name to substitute the name of the meanest cobbler in the street, or the lowest clerk in the house.

Their Lordships knew that the parties had all become bankrupts.

He should suppose the present holders could not recover in an action brought upon this bill.—What would be the state of these parties? He should suppose that another action might be brought. He thought an action for money had and received, might be maintained as against the drawers.

At the time the credit of these different houses was broken up, a vast amount of their engagements stood on such bills, which had been given

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to tradesmen for goods sold and delivered. The consequence might be, that if such bills were held to be a nullity, that these gentlemen would finish their bankruptcy ;—would have their certificates in their pockets, and a vast surplus to themselves.

His Lordship said, it would be a great reproach to justice, and to the laws of England, not to be able to overtake the extravagance of desperate adventurers.

He was of opinion that the judgment of the Court of King's Bench ought to be affirmed.

Lord Bathurst said, that at first he was staggered with what had fallen from the Chief Baron, but now he was very well satisfied, according to the state of the Special Verdict, that this had been always a bill payable to bearer. It was consistent with justice that the holders should recover the amount of the bill for which they had given a valuable consideration ; and Gibson and Johnson having accepted this bill, it was not in their power now to say that they should not be bound. His Lordship therefore thought, that the judgment ought to be affirmed.

The Lord Chancellor then put the question, That this judgment be reversed ; when, without any division,

vifion, the Non Contents had it:—fo that the judgment of the Court of King's Bench was affirmed, in deciding this to be a bill payable to bearer.

Nine of the learned Judges were in favour of the judgment; and the Lord Chancellor, the Chief Baron, and Mr. Justice Heath, were of opinion that it ought to be reverfed.

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